TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946 47

No. 937 36

MARGARET E. SHERRER, PETITIONER,

vs.

EDWARD C. SHERRER

ON WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF BERKSHIRE, COMMONWEALTH OF MASSACHUSETTS

PETITION FOR CERTIORARI FILED JANUARY 22, 1947.

CERTIORARI GRANTED MARCH 3, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

MARGARET E. SHERRER, PETITIONER,

vs.

EDWARD C. SHERRER.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

INDEX

[fol. 1] Register's Certificate to following transcript Omitted in Printing.

[fol. 2]

IN THE PROBATE COURT OF BERKSHIRE COUNTY

Petition to Establish Desertion

To the Honorable the Judge of the Probate Court in and for the County of Berkshire:

Respectfully represents Edward C. Sherrer of Monterey in the County of Berkshire that he is the lawful husband of Margaret E. Sherrer of said Monterey that his said wife has deserted him, and that your petitioner, for justifiable cause, is actually living apart from his said wife and he herein sets forth the following specifications:

That the said Margaret E. Sherrer on the 14th day of November, 1944 in order to evade the laws of the Commonwealth of Massachusetts, obtained an invalid divorce in the state of Florida, and thereafter entered into a void marriage in the said state of Florida with one Henry Phelps of said Monterey; that said divorce and subsequent marriage are invalid, illegal and void. That there has been born to them the following children. Beverly Jean Sherrer March 22, 1934. Gail F. Sherrer March 22, 1939.

He further represents that he desires to be enabled to convey his real estate in the same manner and with the same effect as if he were sole and a decree of this Court so that his said wife, if she shall survive him shall not be entitled under the provisions of Section sixteen of Chapter one hundred and thirty-five of the Revised Laws to waive the provisions of a will made by him.

Wherefore he prays that said Court, after due notice to his said wife and full consideration of the premises, will enter a decree establishing the fact of such desertion, and that such living apart from his wife is on his part a justifiable cause.

Dated this twenty-eighth day of June, A. D. 1945.

Edward C. Sherrer

[fol. 3] IN THE PROBATE COURT OF BERKSHIRE COUNTY

CITATION

To Margaret E. Sherrer of Monterey, in said County.

A petition has been presented to said Court by Edward C. Sherrer your husband of Monterey, in said County representing that you have deserted him and that he is living apart from you for justifiable cause, and praying that said Court will make a decree establishing the fact of such desertion and that he is so living apart from you.

If you desire to object thereto you or your attorney should file a written appearance in said Court at Pittsfield before ten o'clock in the forenoon on the twenty-fourth day of July 1945, the return day of this citation.

Witness, F. Anthony Hanlon, Esquire, Judge of said Court this twenty-eighth day of June in the year one thousand nine hundred and forty-five.

James W. Carolan, Register.

It is ordered that notice of said proceeding be given by delivering or mailing by registered mail a copy of the foregoing citation to said Margaret E. Sherrer fourteen days at least before said return day and if service be made by registered mail; unless it shall appear that she has received actual notice, by publishing a copy thereof once in each week for three successive weeks in the Berkshire Courier a newspaper published in Great Barrington the last publication to be one day at least before said return day.

Witness, F. Anthony Hanlon, Esquire, Judge of said Court this twenty-eighth day of June in the year one thousand nine hundred and forty-five.

James W. Carolan, Register.

[fol. 4] IN THE PROBATE COURT OF BERKSHIRE COUNTY

JUDGMENT—October 8, 1945

At a Probate Court holden at Pittsfield in and for said County of Berkshire, on the eighth day of October in the

year of our Lord one thousand nine hundred and forty-five.

On the petition of Edward C. Sherrer of Monterey in said County the husband of Margaret E. Sherrer of said Monterey praying that said Court will enter a decree establishing the fact that his said wife has deserted him, and that he is living apart from his said wife for justifiable cause.

Due notice of said petition having been given to the said Margaret E. Sherrer and the allegations of the petition appearing to be true;

It is hereby adjudged and determined that the said Margaret E. Sherrer has deserted the said petitioner, and that he is living apart from his said wife for justifiable cause.

F. Anthony Hanlon Judge of Probate Court.

[File endorsement omitted.]

[fol. 5] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

ANSWER OF MARGUERITE E. PHELPS—Filed July 24, 1945

Now comes Marguerite E. Phelps in the above-entitled cause and, for answer to the petitioner herein, says that she is not the wife of the petitioner, Edward C. Sherrer; that she was granted a decree of divorce from the said Edward C. Sherrer in the Circuit Court for the Sixth Judicial District of Florida by decree entered November 29, 1944 and in a proceeding in which the said Edward C. Sherrer appeared and filed an answer and participated in person and by counsel; that following the granting of said decree of divorce by said court in Florida, the respondent duly married Henry Phelps, her present husband,

Wherefore, the respondent says that this Court has no jurisdiction to make the decree sought by the petitioner herein.

Marguerite E. Phelps, By Frederick M. Myers, Her Attorney.

[File endorsement omitted.]

[fol. 6] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

REQUEST THAT TESTIMONY BE REPORTED—Filed September 24, 1945

In the matter of petition for decree that husband is living apart for justifiable cause

To the Honorable the Judge of the Probate Court in and for the County of Berkshire:

Before any evidence is offered in the above matter, the respondent requests that, upon any appeal, the testimony of witnesses who have been examined orally, be reported to the Supreme Judicial Court.

F. M. Myers, Atty. for Respondent.

[File endorsement omitted.]

[fol. 7] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

APPOINTMENT OF COMMISSIONER—Sept. 27, 1945.

In the above entitled case, at the hearing of the same it is ordered, under the provisions of General Laws. C. 215 § 18, at the request of F. M. Myers, Atty. for Respondent that Irene F. Weston be, and she hereby is, appointed Commissioner to take the evidence in said case, to be reported to the Supreme Judicial Court.

F. Anthony Hanlon, Judge of Probate Court.

[File endorsement omitted.]

[fol. 8] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

REQUEST FOR REPORT OF MATERIAL FACTS—Filed October 11, 1945

Now comes the petitioner in the above entitled action and requests a report of material facts on which the decree was based that the petitioner is living apart for justifiable cause.

By his attorneys, Cain & Chesney.

[File endorsement omitted.]

[fol. 9] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

APPEAL—Filed October 23, 1945

Now comes the respondent in the above-entitled matter and appeals from decree entered October 8, 1945, allowing husband's petition that he is living apart for justifiable cause.

Marguerite E. Phelps, described as Margaret E. Sherrer, By F. M. Myers, Her Attorney.

[File endorsement omitted.]

[fol. 10] IN THE PROBATE COURT OF BERKSHIRE COUNTY

REQUEST FOR TRANSMISSION OF RECORD TO SUPREME JUDICIAL COURT—Filed October 23, 1945

KELLOGG & MYERS
Counsellors at Law
Pittsfield, Mass.

Walter C. Kellogg
(1877-1941)
Frederick M. Myers

October 22, 1945

James W. Carolan, Esq.,
Register of Probate
Pittsfield, Mass.

Dear Mr. Carolan:

Please prepare for transmission to the Supreme Judicial Court all papers required to present appeal of respondent in the matter of Edward C. Sherrer vs. Margaret E. Sherrer.

I shall not expect to have exhibits printed as it is my intention to seek to have exhibits incorporated by reference in the appeal.

Very truly yours, F. M. Myers, Attorney for Marguerite E. Phelps (named in the above proceedings as Margaret E. Sherrer).

[File endorsement omitted.]

[fol. 11] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted]

Statement of Evidence

APPEARANCES

Cain & Chesney, Maurice B. Rosenfield, Esq.—For Edward C. Sherrer.

Frederick M. Myers, Esq.—For Margaret E. Sherrer.

Irene F. Weston, Stenographer, September 27, 1945.

[fol. 12] September 27, 1945

Direct examination.

By Lincoln S. Cain, Esq.:

EDWARD C. SHERRER

Q. What is your full name?

A. Edward C. Sherrer.

Q. Where do you live?

A. Monterey, Mass.

Q. You were married at one time to Mrs. Margaret Sherrer?

A. That's right.

Q. When were you married?

A. March 15, 1930.

Q. Where were you married?

A. North Bergen, N. J.

Q. Having been married in North Bergen at that time, where did you live as man and wife immediately thereafter?

A. In Jersey City.

Q. How long did you both live there in Jersey City?

A. Approximately a year, I should say.

Q. Where did you move from there?

A. To North Bergen.

Q. How long did you live in North Bergen?

A. I should say a year or a year and a half at the most.

Q. Where did you go from there?

A. Monterey.

Q. About what date was that?

A. I can tell about the year; I think it was 1932.

Q. Did you live in Monterey with her without moving to any other place until the year 1944?

A. That's right.

Q. Did you live in one house all that time?

A. One house.

Q. Where is that house?

A. That is on the Tyringham Road in Monterey, Mass. Near Lake Garfield.

Q. How many children were born of that marriage?

A. Two.

Q. What are the names of the children?

A. Gail Fairfield and Beverly Jean.

Q. Gail is now how old?

A. Six and a half.

Q. Beverly is now how old?

A. Eleven and a half.

[fol. 13] Q. Did you and your then wife and the two children—you four—comprise the entire household in that house on the 1st of April, 1944?

A. Yes.

Q. Did you in March of 1944 (yes or no to this) have some conversation with your wife in reference to her taking a trip?

A. Yes.

Q. Was Beverly, the older child, present during that conversation?

A. Several times.

Q. Referring now to one of those conversations at which Beverly was present, will you tell us what your wife said and what you said relative to her taking the trip?

A. She said her nerves were pretty well shot and she wanted a rest.

Q. What did you say?

A. I agreed to let her go to Florida.

The Court: What did you say—in substance?

A. I told her she could go.

Q. Was there a conversation that month at which Beverly was present when she discussed the length of time that she would be away?

A. Yes, there was.

Q. Will you tell us what she said at that time?

A. She said that she was coming back within a month.

Q. Is that what she said?

A. Yes, sir.

Q. When did she leave?

A. April 3, 1944.

Q. Did she take the two children with her?

A. Yes.

Q. Sometime prior to that, did you go with her to the railroad station and purchase her ticket?

A. No.

Q. Whether or not you purchased a ticket for Florida for her?

A. I gave her the money to get it.

Q. In going, what did she take with her by way of luggage?

A. Just a suitcase and small bag; one for the children, and the suitcase for herself.

Q. Did she have a trunk?

A. No, sir.

Q. Did she have a trunk at the house?

A. Yes, sir.

[fol. 14] Q. What did she leave at the house that belonged to her?

A. Quite a lot of house dresses. A lot of the children's clothes she couldn't possibly take with her.

Q. After she left did you receive a letter from her?

A. I should say about a week or a week and a half after that a postcard.

Q. Did you continue to live in that house for any length of time after she left?

A. I should say fifteen to twenty days after she left.

Q. Then where did you go?

A. To Mr. Kinne's, Sheriff Kinne's, in the village.

Q. Monterey Village?

A. Yes, Monterey Village.

Q. Have you been living there ever since?

A. Ever since.

Q. I show you six envelopes and ask you if those are letters which you received and whether they are in your wife's handwriting.

A. Yes.

Petitioner's Exhibit #1—Letter from Respondent to Petitioner postmarked April 6, 1944.

Petitioner's Exhibit #2—Letter from Respondent to Petitioner, postmarked April 9, 1944.

Petitioner's Exhibit #3—Letter from Respondent to Petitioner, postmarked April 13, 1944.

Petitioner's Exhibit #4—Letter from Respondent to Petitioner, postmarked April 18, 1944.

Petitioner's Exhibit #5—Letter from Respondent to Petitioner, postmarked April 22, 1944.

Petitioner's Exhibit #6—Letter from Respondent to Petitioner, postmarked April 28, 1944.

Q. Aside from the clothing that you have testified to that she left in the house, did she leave anything else that belonged to her?

A. A couple pieces of furniture.

[fol. 15] Q. Anything else?

A. That is all outside of heirlooms, knick-knacks, stuff she couldn't take with her.

Q. At any rate, she didn't take any of those things with her?

A. No.

Q. When did she return to Monterey?

A. The 5th of February, 1945.

Q. On that date where were you living?

A. At the Kinne's in the village.

Q. At this house you told us you went to?

A. Yes.

Q. Was the farmhouse empty?

A. Unoccupied.

Q. Where did she go when she came back?

A. To that farmhouse we formerly lived in.

Q. Has she been living there from February 5, 1945, to the present time?

A. Yes.

Q. Who has been living there with her?

A. Henry Phelps, her new husband.

Q. To your knowledge, has anyone else been living in that place with them other than your children?

A. No.

Q. Have you continued to live at the Kinne place?

A. I have.

Cross examination.

By Frederick M. Myers, Esq.:

Q. You went to Florida some time between the first of May and the first of August of 1944, Mr. Sherrer?

A. No, I did not.

Q. Did you go to Florida at all in the summer of 1944?

A. I did not. I went in the fall.

Q. Let us find out exactly when it was you went, without regard to the seasons—just give the month.

A. I left New York on November 8th and arrived at St. Petersburg the 9th of November.

Q. How long were you in Florida?

A. Until the 18th.

[fol. 16] Q. While you were in Florida, did you employ an attorney?

A. I did.

Q. Before you left for Florida, had you received any kind of summons issued by the Florida court?

A. I had.

Q. Have you that summons with you?

A. I believe so. I think my attorney has it.

Q. Did you get this letter and its contents from Florida on or about the date which appears on the envelope?

A. Within a couple of days.

Respondent's Exhibit #1—Summons from Circuit Court of Pinellas County, Florida, in the case of Marguerite Eleanore Sherrer vs. Edward Charles Sherrer.

Q. After receiving that summons, did you immediately take any steps to employ counsel in Florida?

A. I consulted Judge Brothers, and he immediately referred me to a lawyer in Florida.

Q. At any rate, my question was whether or not you took steps to employ a lawyer in Florida. I think your answer was responsive, but did you communicate with some law firm in Florida?

A. I did.

Q. In St. Petersburg?

A. Yes.

Q. What was the name of the firm?

A. Bradley & Wehle.

Q. Was Mr. Wehle's first name Victor?

A. Right.

Q. And when the matter of the trial of the case came up in Florida, you were present in court, were you not?

A. I was in the Judge's chambers.

Q. When the case was tried?

A. Yes.

Q. Among the letters which you received from the then Mrs. Sherrer after she had gone to Florida, there was one dated April 22 and registered, was there not?

A. Yes. It was registered.

[fol. 17] Q. Do you recall receiving that particular letter—Exhibit 5?

A. Yes, I received that letter.

Q. You received it on or about the 22nd day of April, 1944?

A. On or about that date.

Q. Did you read it?

A. I read it.

Q. And you noticed the contents included the statement that Mrs. Sherrer—as she was then—was not coming back to you; she would not live with you?

A. I noticed it.

Q. This letter also contained a return of the money which you had sent down to her to buy her passage back, did it not?

A. I sent her the money in general but didn't know what she would use it for. I supposed it would be for that purpose.

Q. But at any rate she returned some money in this letter?

A. That's right.

Q. After you received that letter did you write a letter either to her or to the children in which you suggested committing suicide?

A. I may have.

Q. Is it your memory as to whether you did or did not?

A. At that particular time I would't depend too much on my memory, the condition I was in.

Q. Did you in your letter refer to your intention as being the intention to go on a long journey?

A. That's right.

Q. And not write to your children again?

A. Right.

Q. Was your letter to the children rather than to Mrs. Sherrer?

A. It was.

Q. Previous to the time of your wife's leaving for Florida in April, had she at any time been under a doctor's care—I mean within a twelve-months' period previous to that? For sinus trouble, for example?

A. Yes.

Q. With what doctor?

A. Dr. Marnell.

Q. How long had that sinus condition existed?

A. I should say about a year.

[fol. 18] Q. Had there been any other sort of difficulty that your wife had labored under for which she had required the services of a doctor within the past two or three years?

A. Not that I remember.

Q. Had you at any time ever said to your wife anything about the fact, as you deemed it to be a fact, that her mother had been committed for a mental condition?

Mr. Cain: I object.

The Court: Objection sustained.

Mr. Myers: I except.

Q. Had you at any time prior to your wife leaving you, in the presence of any third person—either Beverly or anyone else—said to your wife that her mother had suffered from a mental condition and had to be committed? Yes or no.

A. I would have to qualify that answer.

Mr. Myers: Go ahead and qualify.

A. She acted in such a way that I thought by telling her about her mother's condition it might straighten her out and help her to mend her ways with the children.

Q. Now, Mr. Sherrer, is it true that before your wife left for Florida you had in any form of words whatever threatened to take proceedings against her to have her committed?

A. I don't remember ever threatening to have her committed.

Q. Had the matter of committing your wife to a mental institution been the subject of conversation between you and your wife?

A. Most emphatically no.

Q. On what do you base your statement already made that on February 5, 1945, Mrs. Sherrer returned to Berkshire County?

A. I went by the house and saw lights on. Next morning I saw them.

[fol. 19] Q. As to the precise date when they came back, you don't know, but they were back February 5th?

A. Yes. It was town meeting night.

Q. How long after February 5th was it before you consulted a lawyer regarding the institution of a suit for alienation of affection against Mr. Phelps?

Mr. Rosenfield: Objection.

The Court: Objection overruled.

Mr. Rosenfield: Exception.

A. As soon as they came back, within three or four days. I think it was eight days—the 13th.

Q. Are you sure, Mr. Sherrer?

A. I am not sure, there are so many dates in this case. That is about the time.

Q. Do you recall causing a writ to be issued against Mr. Henry Phelps?

A. Yes.

Q. I show you a summons to see if that in any way refreshes your memory as to when it was that you had that writ issued. I call your attention to the date at the bottom of it.

A. I said the 13th; this says the 12th.

Q. Of February, 1945?

A. Yes.

Q. Do you remember what the cause of action was?

A. For alienation of affection.

Q. And the ad damnum claimed by you?

A. $15,000.

Q. And that action was brought in the Berkshire County Superior Court by you?

A. Yes, sir.

Q. Mr. Cain: Do you know whether or not Mr. Phelps since your attachment has disposed of his real estate?

A. He has.

That's all.

[fol. 20] Direct examination.

By Mr. Myers:

MARGARET E. PHELPS

Q. What is your name please?

A. Margaret Eleanor Phelps.

Q. You were the wife of the Petitioner here, Mr. Edward Sherrer?

A. Yes.

Q. You have heard the testimony as to some talk with your husband about going to Florida in April of 1944. Was there such talk as was testified to—substantially I mean?

A. Yes.

Q. Did you represent to your husband that it was your intention to go to Florida only temporarily?

A. Yes.

Q. Previous to the time when you had had this talk about going to Florida, had there been some trouble between you and Mr. Sherrer?

A. Yes.

Q. Among other things had there been any suggestion by him as to procuring your commitment to a mental institution? Yes or no.

A. Yes.

Q. Over how long a period of time had that gone?

A. Eight or nine years.

Q. Whether or not during that period of time your husband had threatened to have you committed?

A. He had threatened that.

Q. Will you tell us in your own language substantially what he said to you as to having you committed.

Mr. Rosenfield: I object. Was anyone else present?

Q. At any times when this matter of having you committed had been spoken of by your husband, was anyone present—either the children or anyone else?

A. The children were around.

Q. I ask you to state substantially what it was your husband said with reference to having you committed.

[fol. 21] Mr. Rosenfield: I object.

The Court: Objection sustained.

Q. Was there an occasion when such talk had been had

within the year prior to your leaving for Florida and an occasion when one of the children was present and in a position to hear it?

A. Yes.

Q. Now I ask you the substance of what was said.

Mr. Rosenfield: I object.

The Court: Objection sustained.

Q. Was Beverly present?

A. Yes.

Q. Now go ahead.

A. Shortly before I left he said, "You will be in Northampton within two years."

Q. To refresh your memory, did he say anything about your mother?

A. Yes, he said, "You have got a crazy look in your eyes just like your mother has."

Q. As a result of conversations which your husband had had with you on the subject of committment, will you state to the Court whether in April, 1944, and just as of the time that you were getting ready to leave for Florida, you were in any fear of proceedings being instituted to have you committed.

A. Yes.

Q. Did your fears about being committed have to do with any decision you arrived at as to going to Florida?

A. Yes.

Q. When you stated to your husband (as has been testified to) that you were going to be in Florida only temporarily, were those statements true?

A. No.

Q. What was your intention with reference to staying in Florida as of the time you left in April?

A. I intended to stay there. I couldn't tell him that.

Q. But it was your intention to stay there?

A. Yes.

[fol. 22] Q. From the time you left until for example, the time you wrote the letter in which you returned the money to your husband, did you change that intention at all?

A. I did not change my intention to stay there.

Q. Why did you pick out Florida, Mrs. Phelps, as against some other location?

A. The doctor thought it would be a good place for me. I had had trouble with sinus and I was run down and nervous.

Q. It was at Dr. Marnell's advice that you went to Florida?

A. Yes.

Q. Were you aware of the fact that in leaving as you did, you were leaving among other things a great number of your own personal belongings and some of the children's?

A. Yes.

Q. Were you also aware of the fact that in leaving as you did, you were leaving your interest in the real estate where you had previously lived with Mr. Sherrer?

A. I realized it. I couldn't stand it any longer.

Q. Did you also have in mind, previous to the time you left, that when you got down there you would consult attorneys with reference to seeking a divorce?

A. I could have gotten a divorce here, but I had to get away.

Q. Had you previously consulted counsel in Massachusetts about getting a divorce?

A. I had spoken to Judge Brothers.

Q. And you understood there was a possibility of your getting a divorce in Massachusetts?

A. Yes.

Q. Did you also consult him as to the possibility of your establishing a residence and getting a divorce in Florida?

A. I asked if I could get one there as well as here, and he said yes.

Respondent's Exhibit #2—Transcript of the record of the Florida divorce in the case of Marguerite Eleanore Sherrer vs. Edward Charles Sherrer.

[fol. 23] Q. Mrs. Phelps, were you familiar with the contents of the bill of complaint which was filed in the Florida court and which I just read from the transcript of the record? As to the allegation of your husband's treatment of you?

A. Yes.

Q. I ask you whether or not the statements contained therein in those allegations were true?

Mr. Cain: I object.

The Court: Objection overruled.

A. They are true.

Q. Following the issuance of your divorce decree on November 29, 1944, you were married to Mr. Phelps in Florida?

A. Yes.

Q. And the date of that marriage was when?

A. December 1st.

Q. Did you and Mr. Phelps establish a home in Florida immediately upon your marriage?

A. We had the same residence I had had previously.

Q. As of the time of your marriage, was it still your intention to make your home permanently in Florida?

A. Yes, it was.

Q. After your marriage was it your intention still to continue to make your home in Florida?

A. Yes.

Q. What was Mr. Phelps doing and what were you doing by way of earning a living in St. Petersburg?

A. I was working as a waitress in a restaurant in St. Petersburg. Mr. Phelps was in a lumber yard.

Q. And did you consider your own job as a permanent job?

A. Yes.

Q. Without asking for the conversation, had the matter of your continuing to live and make Florida your home been the subject of conversation between you and Mr. Henry Phelps, your husband?

A. Yes.

Q. Now, did something happen after the first of the year 1945 which had to do with your coming back to Berkshire County?

A. Yes.

[fol. 24] Q. I show you a letter. Did you ever see that letter before?

A. Yes, I have.

Q. That letter came to your husband, Mr. Henry Phelps?

A. Yes it did.

Mr. Myers: I shall offer this, but think it should come through Mr. Phelps.

Q. Was it as a consequence of receiving that letter that you and your husband and the two children went back to Monterey?

A. That was when my husband went back.

Q. And you went with him?

A. Yes.

Q. And you took the two children?

A. They were already in Monterey.

Q. They had been sent to Monterey in accordance with the decree which was entered in the Florida court?

A. That's right.

Q. At the time of your leaving for Monterey sometime in February of 1945, was it then your intention to give up your residence in Florida and go back to Massachusetts to live?

A. No, it was not.

Q. After you arrived in Monterey you did go to the property where you and Mr. Sherrer had previously lived?

A. Yes.

Q. By the way, who was the owner of that property?

Mr. Rosenfield: Objection.

The Court: Objection over-ruled.

Mr. Rosenfield: Exception.

A. Mr. Sherrer and I owned it.

Q. From whom had that property come to you—any interest in it that you had?

Mr. Rosenfield: I object.

The Court: Objection overruled.

A. The property came from my mother.

Q. What was her name?

A. Grace Scott.

[fol. 25] Q. After arriving in the Berkshires with your husband, Mr. Phelps, did you learn of the fact that a suit had been brought against him which has already been testified to?

A. Yes.

Q. Whether or not the fact of the bringing of that suit has had any influence upon you and your husband in your continuing to stay in the Berkshires since February, 1945?

A. Yes.

Q. And it is true that since you came you have been liv-

ing in the property near Lake Garfield which has been mentioned?

A. Yes.

Q. At the time when you left Florida to come back here after this letter had been received, what did you do in the way or retaining any place to live down in Florida, so that after what this letter referred to was taken care of, you could then go back to Florida?

A. We kept our house there.

Q. After the suit had been brought against your husband and you found it was necessary to stay here, did you give up that house?

A. Yes, we found we had to stay here.

Q. Until the time those papers were served on your husband, had you in any way given up your residence in Florida?

A. No.

Q. It was still your intention to continue to live there?

A. Yes.

Q. Did you express that intention in any letters you wrote to friends of yours?

Mr. Rosenfield: Objection.

The Court: Objection over-ruled.

Mr. Rosenfield: Exception.

A. Yes.

Q. Will you name a friend to whom you wrote on that subject?

A. Mrs. Ted Sokoloski.

Q. Approximately when was it you wrote her?

A. During the summer of 1944.

Q. After you got to Florida?

A. Yes.

[fol. 26] Q. Can you put it between certain dates?

A. After April at any rate and before September; it was July or August.

Q. You, of course, do not have that letter.

A. No.

Q. Where is Mrs. Sokoloski?

A. In Arkansas.

Q. Did you while in Florida, sometime in the month of July, receive a letter from any public service agency of the City of St. Petersburg, having to do with the subject of your having permanent residence in St. Petersburg?

A. Yes.

Q. I show you the letter and ask you if that is the letter that you received.

A. Yes.

Mr. Myers: That's all.

Cross examination.

By Mr. Cain:

Q. When you were living with Mr. Sherrer in Monterey in the year 1943 and the early part of 1944, had you and he separated at any time, even for a short while?

Mr. Myers: I will take Your Honor's ruling.

The Court: I will hear the answer.

A. You mean live apart?

Q. Yes, even for a short while?

A. No.

Q. You had, however, argued with each other to some extent during that time.

A. Yes.

Q. But your discussions with him in March about going to Florida for a trip were friendly discussions, were they not?

A. Yes.

Q. The element of quarreling did not enter them in any way, did it? I mean when you were discussing with him the matter of taking this trip.

A. No.

Q. During that time you did tell him definitely that you would be gone about a month, didn't you?

A. Yes.

[fol. 27] Q. But you now say that those statements to him were a deliberate untruth.

A. Yes.

Q. And your daughter Beverly was present at some of those occasions when you uttered the deliberate untruth, was she not?

A. Yes.

Q. And you told your daughter Beverly, when telling her that she was to drop her school in Monterey and go to Florida, that it was only going to be for a short time, didn't you?

A. Yes.

Q. And that was a deliberate untruth to your daughter, wasn't it?

A. It was.

Q. At any rate, you made arrangements with Beverly's school to have her transferred in some way to a school in Florida.

A. Yes.

Q. And in doing so, did you say anything to the school authorities in Monterey about how long she would be out of the Monterey schools?

A. I don't remember.

Q. In other words, you may have said to them that she would only be gone for a few weeks?

A. I can't remember.

Q. As a matter of fact, Mrs. Sherrer, you didn't place Beverly in school in Florida for some weeks after you got there, did you?

A. I think it was two weeks.

Q. You think it was two weeks?

A. Yes.

Q. Were there other people in Monterey with whom you discussed your trip to Florida besides the ones we have mentioned?

A. A lot of people in Monterey knew I was going.

Q. And lots of people knew you were going from statements you yourself made?

A. I talked about going—about the trip.

Q. And to many of them you said it was only a trip and you would be back soon, didn't you?

A. That was all I could say.

Q. That was what you did say to a great many of your friends in Monterey, is that correct?

A. Some of them, I suppose.

[fol. 28] Q. Not a great many, only some, is that right?

A. I don't make a habit of telling my business very much.

Q. At any rate, to some of your friends you also told deliberate untruths with reference to your intentions?

A. Yes.

Q. Did you talk it over with your friend Henry Phelps?

A. No.

Q. The subject of your going to Florida was not dis-

cussed with your friend Henry Phelps during the month of March in the slightest degree, was it?

A. I didn't have discussions with him.

Q. Was he in Monterey during the month of March?

Mr. Myers: I pray Your Honor's judgment.

The Court: That is a proper question.

A. Yes.

Q. Do you mean to tell us you didn't see him that month at all?

A. I saw him.

Q. Did you see him to talk to that month at all?

A. Yes.

Q. As a matter of fact, you talked to him several times that month, didn't you?

A. Yes.

Q. In your own home sometimes?

A. Yes.

Q. And in other places?

A. As he went by.

Q. You talked to him several times in other places during the month of March?

A. I don't remember definite times.

Q. Don't you remember whether you talked to him on other occasions than at your own home during that month?

A. I can't remember.

Q. As a matter of fact, you saw him on occasion at places in Great Barrington that month.

Mr. Myers: I pray Your Honor's judgment.

The Court: I will hear the answer.

A. No.

Q. But in none of those conversations you had with Mr. Phelps was the subject of your trip to Florida mentioned at all, is that right?

A. That's right.

[fol. 29] Q. Do you know when it was that Mr. Phelps left Monterey?

A. No.

Q. Was he in Monterey when you left, if you know?

A. Yes.

Q. You left, Mrs. Sherrer, on the 3rd of April, didn't you?

A. Yes.

Q. And you and your then husband, Mr. Sherrer, were both at home in Monterey on April 2nd, the day before you left?

A. Yes.

The Court: At this point in the hearing it was stipulated by counsel for both parties that in the event tha. the Florida divorce is found to be invalid, the Petitioner—Edward C. Sherrer—is now living apart for justifiable cause.

Q. Did you know when you left for Florida on April 3rd that Mr. Henry Phelps was planning to go to Tampa in the immediate future?

A. I did not.

Q. What date did you arrive in Florida?

A. April 4th.

Q. The very next day after you left?

A. Yes.

Q. In what town?

A. Tampa.

Q. Did you and the children stay in Tampa that night?

A. We stayed there overnight.

Q. At a hotel?

A. Yes.

Q. What was the name of that hotel?

A. I think the name was the Marlboro.

Q. Did you leave Tampa the next day and go to some other town or city?

A. We went to St. Petersburg.

Q. Did you go to a hotel in St. Petersburg? For that night?

A. We went to an apartment.

Q. You mean you hired an apartment?

A. Yes.

Q. For how long a time did you hire the apartment?

A. I had it for three weeks.

Q. Did you engage it for three weeks when you first took it?

A. I was trying to get an apartment through the [fol. 30] Chamber of Commerce and they sent me to this place temporarily. The place where I first went they didn't want to let in any children.

Q. So you did stay in that apartment for three weeks and no longer.

A. Yes.

Q. What was your next address?

A. 2409 Fourth Avenue.

Q. What kind of a place was that?

A. A small cottage.

Q. Near the water?

A. We used to take a trolly to the water.

Q. How large a place was that cottage?

A. Three rooms and two porches.

Q. Was the cottage furnished or unfurnished?

A. Furnished.

Q. Completely furnished?

A. Yes.

Q. How long did you stay in that cottage?

A. Until August.

Q. Do you remember what part of August?

A. The first part. The house was sold and we had to move.

Q. Then did you take another place in St. Petersburg?

A. Yes.

Q. What kind of a place was that?

A. Another small cottage.

Q. Nearby?

A. Within seven blocks.

Q. Was that also completely furnished?

A. Yes, it was.

Q. How long did you stay there?

A. Until February.

Q. Until you left Florida?

A. Yes. Until we left, we still kept the cottage.

Q. You were married on December 1st and lived in that cottage from that date?

A. Yes.

Q. You didn't go an any trip?

A. No.

Q. Have you ever been to Florida since leaving it on February 5th?

A. No.

Q. For how long a time did you keep the cottage that you testified you kept after leaving on February 5th?

A. We kept it for a month after that.

Q. Were you paying rent by the month for that cottage?

A. Yes.

[fol. 31] Q. Did you communicate with the owner that you did not want it any more after you got back to Monterey?

A. I asked him to keep some of our things that were there for us.

Q. By letter you asked that?

A. Yes.

Q. Is that the same letter you wrote saying you did not want the cottage after a month?

A. I asked him to keep our things for us.

Q. And it was in that same letter you told him after the expiration of a month, you would not want the cottage any more?

A. No.

Q. In a different letter?

A. Yes.

Q. In that same letter you asked to have the things sent to you?

A. No.

Q. They still have them?

A. They were sent up later.

Q. How much later?

A. The early part of the summer.

Q. When you first arrived, did you consult an attorney about a divorce?

A. Not at first.

Q. Do you know whether Judge Brothers had written to an attorney about you before you left?

A. I don't know.

Q. Did you go to see the attorney whose name Judge Brothers gave you?

A. He didn't give me any name.

Q. Judge Brothers did not recommend an attorney to you before you went down?

A. No.

Q. Did you go to see an attorney after you got there whom somebody else up here had recommended?

A. No.

Q. What was the date you went to see an attorney about getting a divorce?

A. In July.

Q. So that from April 5th, or 4th, when you arrived, to some date in July, you consulted no attorney about a divorce at all?

A. No.

[fol. 32] Q. Had Judge Brothers informed you that you would have to wait three months in Florida before you could apply for a divorce?

A. I didn't ask him.

Q. Had somebody else so informed you?

A. No.

Q. So that when you went to this attorney in July, before going to him you had no idea how long a period of time you had to wait before applying for a divorce in Florida?

A. No.

Q. None whatever?

A. No.

Q. Do you remember what date in July you went to him?

A. The 7th, I think.

Q. This is your signature here, isn't it?

A. Yes.

Q. Do you remember taking an oath to this paper at the time you signed it?

A. Yes.

Q. And I call your attention to the Notary Public to whom you made oath and signed here. "Sworn to and subscribed the 6th day of July."

A. Yes.

Q. Do you now say it was the 6th day of July or before that that you saw this attorney?

A. The 6th.

Q. After you saw this attorney, did he draw up this paper while you were in his office and you signed it that very same day?

A. Yes.

Q. What was the name of the lawyer that you first talked with about getting a divorce in Florida?

A. Thomas Collins.

Q. And you went to Mr. Collin's office on some day in July?

A. Yes.

Q. Did you see Mr. Collins himself when you first went there?

A. Yes.

Q. And did you tell your story to him and tell him what you wanted?

A. I did.

Q. Did he then, immediately after listening to your story, prepare this bill of complaint?

A. He asked me questions and I answered them.

[fol. 33] Q. Did you wait in his office while it was being typed?

A. I went out and then came back.

Q. But that very same day you came back and signed it?

A. Yes.

Q. Did he tell you that it would be possible to apply for a divorce in Florida immediately at that time?

Mr. Myers: I pray Your Honor's judgment.

The Court: I will hear the answer.

A. Yes.

Q. Did he tell you that you had waited just long enough?

A. He didn't say.

Q. Did he tell you that the period of waiting in Florida for a divorce was ninety days or three months?

A. No.

Q. So that you have never been so advised by any attorney or by anybody from the time you left Massachusetts until the present day that three months is the waiting period in Florida?

A. I asked him if he could start proceedings and he said yes.

Q. What was it that prompted you to go to a lawyer about a divorce on that particular day—July 6th?

A. I had just begun to feel well enough. I didn't feel well when I first went down.

Q. Is that the only reason?

A. Yes.

Q. That your health had improved?

A. Yes.

Q. When did you first see Henry Phelps down there?

Mr. Myers: I pray judgment.

The Court: I will hear the answer.
Mr. Myers: I except.

A. I don't remember.
Q. Don't you remember what month it was?
A. April.
Q. Don't you remember whether it was one week after you arrived or three weeks?
A. Not exactly.
Q. As a matter of fact, Mrs. Sherrer, it was about a week after you arrived that you first saw him down there, wasn't it?
A. I don't remember exactly how long.
[fol. 34] Q. You don't even remember approximately how long?

Mr. Myers: Objection.
The Court: Sustained.

Q. At any rate, you saw him some time within three weeks after you got there?

Mr. Myers: I will take Your Honor's ruling.
The Court: The question is allowed.

A. Yes.
Q. Where did you see him?
A. On Central Avenue.
Q. On the street?
A. Yes.
Q. Where were you living at that time?
A. 406 Manhattan Court.
Q. Did Mr. Phelps call at your house on various occasions after that?

Mr. Myers: I pray judgment.
The Court: I will hear the answer.
Mr. Myers: Exception.

A. Yes.
Q. As a matter of fact, Mr. Phelps was a very frequent caller at your house from the time you first saw him in April until you got your divorce, wasn't he?

Mr. Myers: Objection.
The Court: Objection over-ruled.
Mr. Myers: Exception.

A. He came once in a while.

Q. Did he come as often as once a week?
A. Not always.
Q. Did he sometimes come more than once a week?
A. Occasionally.
Q. Did two weeks ever go by during which he did not come?
A. Yes.
Q. Did three weeks ever go by during which he did not come?
A. Yes.
Q. Were there whole months during which he did not come to see you?
A. Yes.
[fol. 35] Q. Were there whole months during which you did not see him anywhere?
A. Yes.
Q. You got a job, didn't you?
A. Yes.
Q. What was the first job you got?
A. I was working in a doctor's home.
Q. How long did that job last?
A. Until they went North.
Q. How long?
A. A month.
Q. When did you first get that job?
A. About the first of May.
Q. So that you were there practically the month of May?
A. Yes.
Q. Did you get another job after that?
A. Yes, they recommended me to a friend of theirs—another doctor.
Q. Did you get the job?
A. I got it.
Q. When?
A. In June.
Q. Was that also working for a doctor in his home or in his office?
A. In his home. I took care of their boy and did cooking.
Q. How long did you keep that job?
A. About three weeks. They also went away.
Q. Then did you get another one?

A. I had a job in a restaurant down there.
Q. That is the job you kept?
A. I had two jobs.
Q. How long did the first one last?
A. A week.
Q. When did you get the next one?
A. About a week after that.
Q. And that job you kept until February?
A. Yes.
Q. That was as a waitress in a restaurant?
A. Yes.
Q. You wrote some letters to your husband in April, didn't you?
A. Yes.
Q. Did you write any letters to him after April?
A. I can't remember the exact date.
Q. Did you write any?
A. I don't know.

[fol. 36] Q. Don't you remember whether you wrote any letters during May, June, July, August, September, October, or not?

A. I returned money to him. I don't remember when.
Q. I show you that one and ask if that is the letter you wrote him on April 27th (Exhibit 6)? No question about that?
A. No.
Q. Having seen this letter, do you remember whether you wrote him any letters at all after that?
A. No, I don't.
Q. You don't remember—is that what you mean?
A. I don't remember.
Q. You don't remember writing him any more do you?
A. I wrote him I wasn't coming back, but I don't remember whether it was before or after that one.
Q. On April 22nd you mailed to him a letter by registered mail, in which you told him you were not coming back, didn't you?
A. Yes.
Q. And this is the letter, isn't it? (referring to Exhibit 5)
A. Yes.
Q. I now ask you again—did you write him any letters after April 27th?

A. I don't think so.

Q. The reason you told your husband before you left that you would be back in a month was so he would let you go away, wasn't it?

A. Yes.

Q. You would not have lied to him except that you felt he might hold you there and not let you go, isn't that so?

A. Yes.

Q. Do you remember writing him after you got down there, referring to the fact that you were looking for reservations for getting back?

A. Yes.

Q. Had he written you a letter before you wrote him, speaking about reservations, in which he said he was coming down?

A. He telephoned.

Q. Had he written you to that effect?

A. He said he might come down.

[fol. 37] Q. That was the letter you got from him before writing him that you were looking for reservations, is that right?

A. Yes.

Q. Have you got that letter?

A. No.

Q. Did you destroy it?

A. I destroyed the letter.

Q. When was it that he phoned you?

A. It was during the first three weeks—when I was at Manhattan Court.

Q. In that telephone call he told you he might be down?

A. He told me he would have troopers looking for me. He threatened me.

Q. He told you he was going to have troopers bother you down in St. Petersburg?

A. Yes.

Q. And is that the reason you wrote him a letter saying you were looking for reservations and would be home?

A. I wanted to make him think I would be coming back.

Q. I show you this letter (Exhibit 4) and ask you if that is the letter you have in mind?

A. Yes.

Q. And you tell us, Mrs. Sherrer, you wrote this letter—among other things—for the purpose of preventing his coming down to see you?

A. Yes.

Q. In it you said, "We can get reservations if we are not fussy about trains. I heard some of them asking for drawing rooms, but they just put their names down. Next time you write you had better address the letter to General Delivery, St. Petersburg, as I would like to get near another beach if possible for the rest of our stay." That was said for the purpose of keeping him back in Massachusetts?

A. Yes.

Q. And for no other purpose?

A. Yes.

Q. It was an out-and-out falsehood.

A. Yes.

Q. And didn't convey the true state of your mind.

A. No.

Q. As a matter of fact, he didn't come down within several weeks or months of that letter, did he?

A. No.

Q. Did he telephone again?

A. No.

[fol. 38] Q. Did he write any more letters to you saying that he might be down?

A. He sent telegrams.

Q. In them did he say he might be down?

A. No, I don't think so.

Q. Did he write any letters saying that he might be down?

A. Yes.

Q. Did he write more than one letter after that saying that he was coming down?

A. I don't remember.

Q. But he wrote you at least one.

A. Yes.

Q. After you received a letter from him at some time after all this saying he might come down, did you take any further steps at all to prevent his doing so?

A. No.

Q. You put Beverly in school, is that right?

A. Yes.

Q. When did you do that?

A. When we were at Manhattan Court, I think.

Q. Do you remember the approximate date?

A. About the middle of April.

Q. Did Beverly stay in the same school through the school year?

A. She was tranferred to another school when we moved.

Q. Before the end of that school year?

A. Yes.

Q. At any rate, you kept her in some school through the school year?

A. Yes.

Q. In the fall, did she go to school again?

A. Yes, she did.

Q. Did she stay in that school up to the time she left?

A. Yes.

Q. Did you have a talk with Beverly about coming back?

A. I didn't tell her that I was not coming back.

Q. You never told Beverly that you weren't coming back? Did you tell her you were coming back?

A. I let her think we were.

Q. Did you tell her that you were?

A. I may have.

Q. And it is a fact, too, isn't it, that Beverly told you many times that she wanted to come back?

[fol. 39] Mr. Myers: I pray Your Honor's judgment.

The Court: I will hear the answer.

A. At first, then she became more contented.

Q. To your knowledge, when did Mr. Scherrer arrive down there?

A. November was the first time, I think.

Q. In November there was a hearing on the divorce?

A. Yes.

Q. Was the hearing held in the Court room—where there was a Judge's Bench—or in what we call Chambers?

A. There was a bench.

Q. A large Court room?

A. Yes.

Q. Mr. Sherrer's lawyer was present?

A. Yes.

Q. Was Mr. Sherrer present?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. He was there.

Q. Was Mr. Sherrer there in the Court room all during the time that you were testifying?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. I don't remember his going out.

Q. Were you there when he testified?

A. Yes.

Q. After you married Mr. Phelps, you and he came back together the first week of February?

A. Yes.

Q. Why did you come back?

A. Because his father was taken ill and wasn't expected to live.

Q. On going away you had an arrangement with your landlord that he would keep the cottage for you for one month, is that so?

A. Yes, until we found out the conditions.

Q. You didn't ask the landlord to hold it for more than one month, did you?

A. He said whenever we came back, he would have a place for us.

[fol. 40] Q. And it wasn't until after you got back that you first heard about this lawsuit against Mr. Phelps?

A. Not until after we got back.

Q. Shortly after you got back?

A. Yes.

Q. Were you planning to go back to Florida as soon as Mr. Phelps' father's health cleared up?

A. Yes.

Q. Did his health clear up?

A. He got a little better, but he is not very well—never very well.

Q. He is still living?

A. Still living.

Q. After he got a little better, you would have gone back except for the lawsuit?

A. Yes.

Q. So that the only thing which held you and Mr. Phelps in Monterey, after you got back here, was the lawsuit?

A. We wanted to see if Mr. Phelps, Sr. got better.

Q. But he did get better?

A. Yes.

Q. He got enough better so except for the papers you would have gone back, is that so?

A. We would have gone back.

Q. Town meeting came shortly after you got back in Monterey, didn't it?

A. Yes.

Q. Did you attend it?

A. No.

Q. Have you voted in any way in Monterey since you got back?

A. No.

Q. All your things in Florida have now been sent for, isn't that so?

Mr. Myers: I will take Your Honor's ruling.

The Court: I will hear the answer.

A. Yes.

Q. You were under the impression, were you, Mrs. Phelps, that so long as the alienation of affection case was pending against you here, you had to stay here all the time?

A. We can't afford to go back and forth.

Q. When did Beverly come back from Florida to here?

A. In November.

[fol. 41] Q. After Beverly came back, did you write Beverly a letter indicating that you were thinking of going to California?

A. Yes.

Q. And is it a fact that some time between November and February you were considering such a trip?

A. A trip, yes.

Q. It was just a trip?

A. Yes.

Q. So that although you are not able to afford to make a trip to Florida and come back for the trial of this case, you could afford to take a trip to California?

A. We had a chance to go with some other people.

Q. You and your husband?

A. Yes.

Q. But you went to Florida to live because you wanted to live in a warm climate, didn't you?

A. Yes, the doctor advised me to go there.

Q. After you got there, you still had that desire to live in a place with a warm climate?

A. I liked it there.

Q. Because of the warm climate?

A. I liked it down there.

Q. But one of your main reasons for liking it is that it has a warm climate?

A. That is one of them.

Q. At any rate, Mrs. Phelps, you felt, and have felt ever since you got back here, that it is absolutely necessary for you to stay here because of this lawsuit, haven't you?

A. Yes, because we could not go back and forth.

Q. Did you ever, at any time while you were down there, send for your clothing that you had left in Monterey, or for your trunk or for any of your furniture?

A. I knew it wouldn't do me any good to send for anything.

Q. But did you?

A. No.

Q. What things were there that you left down there when you came back here in February?

A. Mostly clothes.

Mr. Cain: That's all.

[fol. 42] Redirect examination.

By Mr. Myers:

Q. Were you and your husband advised by your attorney to stay and fight this suit which had been brought against you?

A. Yes.

Recross examination.

By Mr. Cain:

Q. Were you also advised by your attorney that your presence was essential all the time your suit was pending and before trial?

A. No.

Q. So that the reason you have been staying here all this time is not because the suit is pending but because, as you say, you can't afford to go down there and come back for the trial?

A. Yes.

Q. Were you advised by your attorney as to when the case was likely to be reached for trial?

Mr. Myers: I will take Your Honor's ruling.

The Court: I will hear the answer.

A. At first I thought it was the first date which is on the paper, which is sometime in April, I think.

Q. There was an April date on the summons?

A. I think so.

Q. When you asked him, he said no, didn't he?

A. Yes.

Q. Didn't he tell you that it could not possibly be tried before October of this year?

A. Yes.

Q. So that you knew, Mrs. Phelps, in making your decision not to go back to Florida after Mr. Phelps, Sr. got better, you knew there would be no need of your presence up here at least until October, didn't you, as far as that case was concerned?

A. Yes.

Mr. Cain: That's all.

[fol. 43] Direct examination.

By Mr. Myers:

HENRY A. PHELPS

Q. What is your name?

A. Henry Arthur Phelps, Jr.

Q. You are the husband of the witness who just testified?

A. I am.

Q. You have an aunt whose first name is Susan?

A. Yes.

Q. What is her other name?

A. Kupec.

Q. Where does she live?

A. Westfield, Mass.

Q. After you had married your present wife, what was your intention with reference to where you were going to make your home?

A. In Florida.

Q. Did you secure a job there?

A. I did.

Q. Were you working at that job between the time of your marriage and the time you got a certain letter from your aunt?

A. I was.

Q. You had left certain property in Massachusetts when you went from Monterey to Florida?

A. Yes.

Q. What did that property consist of?

A. It was run-down land and I put a shack on it.

Q. In Monterey?

A. Yes.

Q. Before you went to Florida, had you made any negotiations about disposing of that property?

A. No.

Q. After you got there, had you entered into some negotiation about disposing of it?

A. No.

Q. Who was living in that house after you left and went to Florida?

A. My father.

Q. I show you a letter and envelope and ask you when you received it, with reference to the postmarked date?

A. The 28th of January, I think, something like that.

Q. At any rate, was it about the time of the postmark?

A. Yes.

[fol. 44] Q. And you received it while you were in Florida?

A. Yes.

Q. As a result of receiving that letter, what did you do?

A. We were not fixed to come right then, but made it so we could come up to see my father.

Q. Where did you come to?

A. Westfield first.

Q. And then?

A. To Monterey.

The Court: Letter from Aunt Susan to Henry Phelps, dated January 25, 1944, marked Exhibit "A" for identification.

Q. As a result of getting that letter, you came back to Monterey. In what condition did you find your father?

A. He was very sick when we first came back.

Q. For how long was it before his condition changed materially for the better—approximately?

A. About two weeks, I guess.

Q. Before his condition had changed for the better, were you served with a summons in the suit brought by Mr. Sherrer against you—the summons which I hand you?

A. Yes, I was.

Q. Do you remember the exact date when it was served?

A. I don't know.

Q. Was it on or about February 12, 1945?

A. Yes, it was.

It is agreed that a writ was served in an action brought by Edward C. Sherrer against Henry Phelps for Alienation of Affections and Loss of Consortium (sic), returnable to the Berkshire County Superior Court April 2, 1945; ad damnum $15,000; date of the writ, February 12, 1945. The time when it was served on the witness to be governed by the testimony.

Q. After that was served, did you and your wife consult an attorney about the matter?

A. Yes.

Q. Without going into the subject matter of the consultation at all, will you state whether there have been [fol. 45] numerous conferences on the subject matter of that suit between the time when it was served on you and the time when this particular petition which is now being heard was served on Mrs. Phelps.

A. Yes.

Q. Both you and your wife have taken part in those discussions and negotiations?

A. Yes, sir.

Q. Whether or not you and your wife have reached a decision—after discussion—as to staying in Berkshire County to meet this charge that is in this suit?

A. Yes.

Q. What is the decision?

A. We intend to stay until the case is tried.

Cross examination.

By Mr. Cain:

Q. Did you have occasion to talk with Mrs. Sherrer back in March 1944, about her trip to Florida?

A. I knew nothing of her going to Florida.
Q. When did you go to Florida?
A. About the 14th of April, I think.
Q. When did you leave Monterey?
A. About two days before that.
Q. You went direct from Monterey to Florida?
A. Yes. I was a day and night on the way, I think.
Q. At that time, when you left Monterey for Florida, you knew Mrs. Sherrer had gone to Florida?
A. Yes, it was nation-wide talk. Everyone knew she had gone.
Q. But you for one never talked with her about her trip before she left?
A. No, I did not.
Q. You saw her frequently before then, didn't you?
A. I went down there when my father was sick. When he was staying with me, he was sick and I went down there occasionally to use the phone to call the doctor.
[fol. 46] Q. Did you meet Mrs. Sherrer about once every week in Great Barrington during the months of February and March, 1944?

Mr. Myers: Objection.
The Court: Objection over-ruled.

A. No.
Q. And you heard from no source whatever prior to her going that she was going to Florida?
A. I said once it was nation-wide talk in Monterey.
Q. What was nation-wide talk?
A. Her going to Florida; that she had gone.
Q. Also before she went?
A. I was sick at the time and didn't see hardly anyone in the town except the doctor.
Q. During the month of March you were sick and didn't hear the nation-wide talk?
A. Not until I got out.
Q. When did you get out?
A. Around the 1st of April.
Q. Then you heard it?
A. Yes.
Q. So that when Mrs. Sherrer left, you had already heard some talk that she intended to go?
A. No, that she had gone.

Q. Do you remember when you got out from your sickness with reference to the time that she left for Florida?

A. I didn't know when she left. I got out about the 1st of April.

Q. You saw her after that?

A. No, I did not.

Q. When did you last see her before she went?

A. The first part of March when my father was sick, and then I had the mumps.

Q. Your father had a heart condition?

A. Yes, sir.

Q. Did he have a series of heart attacks the early part of March?

A. No, I don't think he had a heart attack. He had rheumatism. He was in bed and I called the doctor.

Q. P fore you got the mumps?

A. Yes.

Q. Was your father sick throughout the month of March and into April?

A. He was able to be around when I was taken sick. Somebody had to be around. I couldn't get out of bed.

[fol. 47] Q. Who lived with your father, except you, at the time?

A. No one.

Q. So that when you went to Florida, your father was left alone?

A. Yes, he was much better.

Q. But he had, however, had heart attacks prior to that?

A. Not heart attacks. He had rheumatism, but he had gotten over it.

Q. Was it rheumatism you called the doctor for?

A. Yes.

Q. At various times when you were in Florida, you got word your father had taken sick?

A. Yes.

Q. Did you at any time after you went to Florida, and prior to February 3rd, respond to any ot these pieces of information about your father's condition and come back to visit him or in any way respond?

A. No, he wasn't down sick in bed until I got that letter that I know of.

Q. As far as you knew, he was living alone?

A. No, he was with his sister in Westfield some of the time and some of the time in Great Barrington.

Q. And some of the time in the house in Monterey?

A. Shortly after I left, he went to Great Barrington.

Q. When did you decide to go to Florida?

A. I heard they were making big money down there, so I went to Tampa in the ship yard.

Q. When did you decide to go?

A. After I got over being sick.

Q. Was it part of the nation-wide talk about Mrs. Sherrer as to just where she had gone?

A. No.

Q. And did you know?

A. No.

Q. But you did know she had gone to Florida?

A. Yes.

Q. When you got down there, did you look her up?

Mr. Myers: I pray Your Honor's judgment.

The Court: I will hear the answer.

Mr. Myers: Exception.

A. No.

[fol. 48] Q. Your meeting with her on some street in St. Petersburg was purely by accident, is that so?

A. Yes.

Q. You visited at her house frequently after that, didn't you?

A. Once in a while.

Q. About how often?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Sometimes once a week.

Q. Did that frequency prevail right through from the time you met her until you got married to her?

A. I didn't see her every week. I was in Tampa working and had to work overtime sometimes. I wasn't paying any attention anyhow; I just knew nobody down there and saw no harm in making a visit.

Q. But you say you saw her about once a week all the time?

A. No, not once every week.

Q. Were there times when you didn't see her for as much as a whole month?

A. Yes.

Q. At times you didn't see her for as much as two or three months?

A. I couldn't say.

Q. There might have been?

A. There might have been.

Q. During the period from August 1st to the end of November, there might be a two or three month interval during which you didn't see her at all, isn't that so?

A. No.

Q. How frequently did you see her during that time?

A. Once or twice, maybe three times.

Q. Maybe three times during that whole period?

A. Yes.

Q. I don't want any misunderstanding about that. You now say from August 1st to the end of November, 1944, you may have seen her only two or three times?

A. Yes. I don't believe I saw her more than that.

[fol. 49] Q. I now ask you about how many times you think you saw her from the middle of April to August 1st?

A. I don't just remember how many times I saw her.

Q. Did you see her as many as ten times?

A. It is possible. I don't know.

Q. You are not able to give us any idea whatsoever how many times you saw her from the middle of April to the 1st of August?

A. No.

Mr. Cain: That's all.

Rebuttal.

By Mr. Cain:

EDWARD C. SHERRER

Q. Mr. Sherrer, were you able to give us any information—from your own knowledge—as to how often your wife saw Mr. Phelps during February and March, 1944?

A. Yes.

Q. What can you tell us with reference to that—from your own knowledge?

Mr. Myers: Objection.
The Court: Objection over-ruled.
Mr. Myers: Exception.

A. I made a trip to New Jersey and when I came back from New Jersey, I parked the car at the bottom of the hill. The house was dark, and all was quiet. I came up the hill and then the lights were on in the house and when I went in, they were standing six to eight feet apart, both very nervous. He said he had just telephoned.

Q. When was that?

A. That was between January 19th and 23rd, 1944.

Q. Did you see them together after that and before she left?

A. Yes, but not alone.

[fol. 50] Q. How many times did you see them together after that?

Mr. Myers: Objection.
The Court: Objection over-ruled.
Mr. Myers: Exception.

A. When he came in the house to telephone.

Q. How often was that?

A. Twice a week.

Q. Did they talk together at those times?

A. No.

Q. Did your wife go to Great Barrington once a week and stay all day and all evening during the period of February and March, 1944?

Mr. Myers: Objection.
The Court: Objection over-ruled.
Mr. Myers: Exception.

A. Yes.

Q. And did she discuss those trips with you in the presence of Beverly?

A. I wouldn't say yes to that. I very seldom discussed anything in front of the child.

Q. So that any discussion you had with your wife was just alone with her?

A. Yes.

Q. What day of the week was that?

A. Tuesday.

Q. Tell us what you observed with reference to Henry

Phelps on Tuesday evenings after your wife's return from Great Barrington?

Mr. Myers: Objection.
The Court: Objection over-ruled.
Mr. Myers: Exception.

A. She returned about eleven o'clock most every night, and he would come along about quarter or twenty minutes after eleven. There were no exceptions.

Q. Do you have any further information—to your own knowledge—as to whether they were together those days?

Mr. Myers: Objection.
[fol. 51] The Court: Objection over-ruled.

A. Yes. My own observation of her reaction to me when she went to bed.

Q. Give us your observation of her attitude towards you on Tuesday nights.

Mr. Myers: Objection.
The Court: Objection over-ruled.
Mr. Myers: Exception.

A. Absolutely cool and almost insolent.

Q. Was this attitude toward you on Tuesday nights, to which you have alluded, different or the same as on other nights?

Mr. Myers: Objection.
The Court: Objection over-ruled.
Mr. Myers: Exception.

A. Different.

Q. Do you know when Phelps left Monterey?

A. I believe he visited me on a Sunday following their departure. I think he left Monday, about a week later. I didn't see him at the train.

Q. What day was it?

A. Monday, the 10th, I would say.

Q. When did you get to Florida?

A. November 9th.

Q. Did you observe contraceptives around the house while she was still there?

Mr. Myers: Objection.
The Court: Sustained.
Mr. Cain: Exception.

Mr. Cain: I offer to prove that the answer to the question is yes.

Q. Did you observe whether the contraceptives were still in the house after she left?

Mr. Myers: Objection.
The Court: Sustained.
Mr. Cain: I offer to prove that his answer would be that he observed that the contraceptives were gone.

[fol. 52] Did she use contraceptives with you?

Mr. Myers: Objection.
The Court: Sustained.
Mr. Cain: I offer to prove the answer would be that she did not.

Q. After reaching Florida, how long was it before the divorce hearing was held?
A. Five days after I arrived—from the 9th to the 14th.
Q. Did you discuss the matter with your attorney?
A. On Friday after I arrived, and on Monday.
Q. Did you accompany him to the divorce hearing?
A. No, I arrived alone and met him at the Judge's chambers.
Q. Were you present when Mrs. Sherrer testified?
A. No.
Q. Do you know whether she testified in the Court room or in the Judge's chamber?

Mr. Myers: Objection.
The Court: Objection over-ruled.
Mr. Myers: Exception.

A. I think in the Judge's chamber.
Q. Where were you when she was testifying?
A. In one of the anterooms.
Q. Was your lawyer in the place where she was testifying?
A. I think so, because he wasn't with me.
Q. When did you next see her?
A. When I went before the Judge, and he took what little testimony I had to offer.
Q. Were you in the presence of the Judge during that hearing at any time except when you yourself were testifying?

Mr. Myers: Objection.
The Court: Objection over-ruled.
Mr. Myers: Exception.

A. No, sir.
Q. You brought the children back with you?
A. Yes, sir.
[fol. 53] Q. When?
A. The 19th of November.
Q. Have you knowledge of your own with reference to the health of Mr. Phelps, Senior, during the time Henry Phelps was in Florida?
A. He was in pretty bad shape is all I know.
Q. Did you know?
A. I saw him going up and down the road, and I went up to visit him.
Q. When was it you visited him?
A. About a week after his son went away.
Q. Did you visit him after that?
A. No, I did not.
Q. Did he stay in Monterey or move elsewhere?
A. He moved elsewhere; I heard Westfield.
Q. Did you telephone your wife sometime in April?
A. I did.
Q. Did you send her a telegram after that?
A. A couple of weeks after that.
Q. Did you send her a telegram saying you might go down there?
A. I did.
Q. Did you write to your wife after April?
A. All during April. I don't believe I did after April 30th.
Q. Did she write you after April 30th?
A. I don't believe so—to the best of my knowledge.
Q. Aside from one telephone call and a telegram, did you communicate with her in any way?
A. No, sir, not directly.

Mr. Cain: That's all.

MR. MYERS

Q. Did you phone her at one time you would have the troopers after her?
A. I phoned her.

Q. When you were in the presence of the Judge in the Florida court (you, yourself) Mrs. Sherrer was also present?

A. I believe so, yes.

After being duly examined as to competency to testify, the child, Beverly Jean, was sworn and gave testimony as follows:

[fol. 54] Direct examination.

By Mr. Cain:

BEVERLY JEAN SHERRER

Q. What is your full name?

A. Beverly Jean Sherrer.

Q. Did you and your sister, Gail, go to Florida with your mother last year?

A. Yes.

Q. Did your mother tell you how long you were going to stay?

A. Yes.

Q. What did she say?

A. She said we were going to stay a month.

Q. Where were you when she told you that?

A. At home.

Q. Monterey?

A. Yes.

Q. Do you know what city you went to when you went to Florida?

A. Tampa.

Q. Do you know what city you went to after that?

A. St. Petersburg.

Q. You lived in different houses there?

A. Yes.

Q. While you were down there, did you talk with your mother about coming back?

A. Yes.

Q. What did your mother say?

A. She said she was coming back in a month at first.

Q. Then later did you talk with her about it again?

A. Yes.

Q. What did she say then?

A. I never got anything definite.

Q. Did you see Mr. Phelps while you were down there?

A. Yes.

Q. Did you used to see Mr. Phelps before you left Monterey?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. I saw him at our house.

Q. Can you tell us how often?

A. I don't remember.

Q. Do you remember how soon it was after you got to Florida when you first saw Mr. Phelps?

[fol. 55] Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. About a week.

Q. Where was that?

A. At the apartment where we were living at first.

Q. Did you see him after that?

A. Yes.

Q. About how often?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. About once a week.

Q. Do you remember the different months—May, June, July, August—where you were living during those months?

A. Yes.

Q. When summer came, how often did Mr. Phelps come to the house?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. In the first part about once a week and then more often.

Q. How often did he come later?

A. Five times a week.

Q. Do you remember when your father got down there?

A. About.

Q. Did you see your father down there in St. Petersburg?

A. Yes.

Q. Just before your father came down, how often did Mr. Phelps come to your house?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Quite a bit.

[fol. 56] Q. Can you tell us how many times a week?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Maybe four or five times.

Q. When Mr. Phelps came during that time, how long did he stay?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. I can't remember.

Q. Do you remember whether he came mornings, afternoons, or evenings?

A. In the afternoon and evening—late afternoon.

Q. Did he have supper there?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Sometimes.

Mr. Cain: That's all.

Cross-examination.

By Mr. Myers:

Q. What did you mean when you said you never got anything definite from your mother?

A. She never said when we were coming back.

Q. Were you trying to get something definite?

A. Yes.

Q. Were you examining her because your father asked you to?

A. No.

[fol. 57] Q. Why were you examining her?

A. Because I wanted to get back and see my friends.

Q. You haven't any idea at all how long Mr. Phelps stayed at any time he came there while you were in Florida?

A. No.

Q. You haven't any definite memory as to when he came during any period of time?

A. No.

Mr. Myers: That's all.

Redirect-examination.

By Mr. Cain:

Q. What time did you go to bed?

A. Between eight and nine.

Q. When Mr. Phelps came, was he there when you went to bed?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Sometimes.

Q. After you got back to Monterey in the winter, did you get a letter from your mother?

A. Yes.

Q. Is this the letter?

A. Yes.

Petitioner's Exhibit #7—Letter from Respondent to her children, dated January 7, 1945.

Q. Do you remember how soon you went to school after you got down there?

A. Two and a half to three weeks.

Q. Are you sure of that, Beverly?

A. I am not quite sure, but somewhere around there.

Mr. Cain: That's all.

[fol. 58] Recross-examination.

By Mr. Myers:

Q. Where is Gail now, your sister?

A. She is with my mother.

Q. Where you are staying is with Mr. Kinne, Miss Kinne, and your father?

A. Yes.

Mr. Myers: That's all.

It is stipulated by counsel that the spelling of the names of the parties in all the pleadings should be Scherrer instead of Sherrer.

Stenographer's certificate omitted in printing.

[fol. 59] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

MOTION TO DISPENSE WITH REPRODUCING EXHIBITS—Filed November 7, 1945

Now comes Marguerite E. Phelps, herein described as Margaret E. Sherrer, appellant, and says that the reproduction of the exhibits in the record herein upon appeal to the Supreme Judicial Court would entail burdensome and unwarranted expense.

Wherefore, she moves that certificate be issued to that effect so that said exhibits need not be reproduced but that the exhibits may be presented to the Full Court at the time of argument or of submission on briefs.

Marguerite E. Phelps, By F. M. Myers, Her Attorney.

[File endorsement omitted.]

[fol. 60] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

REPORT OF MATERIAL FACTS—Filed November 8, 1945

The petitioner and respondent were married March 15, 1930, at North Bergan, New Jersey, and took up their residence in Monterey, Massachusetts, in 1932, where they lived together as husband and wife until April 3, 1944.

Two children were born to them, Gail Fairfield, now 6 1/2 years old, and Beverly Jean, now 11 1/2 years old.

The husband, wife and two children comprised the entire household.

The respondent's mother, sometime prior to March, 1941, had been committed to a mental hospital in Northampton, and the petitioner thereafter made occasional references to this fact. Such references were dis-

turbing to the respondent and resulted in friction between her and the petitioner. She became nervous and upset, and a sinus condition from which she suffered became worse.

In March, 1944, the respondent told the petitioner that she wished to take a trip to Florida as she needed a rest. She said she wished to take the two children with her, and would be gone about a month. The petitioner consented to her taking this trip and gave her the necessary funds. She and the children left Monterey April 3, 1944, and arrived at Tampa, Florida, the following day. She had told the two children as well as her husband that she [fol. 61] intended to return to Monterey in a month, and had told some of her friends in Monterey the same thing. All she took by way of baggage was a suitcase and a small bag. She had a trunk but did not take it.

The respondent and her two children stayed in Tampa overnight and the next day went to St. Petersburg where she hired an apartment which they occupied for three weeks. Thereafter they moved to a cottage in St. Petersburg which they rented furnished, and about three months later moved to another furnished cottage in the same city, which they continued to occupy as long as they remained in Florida.

About a week after the respondent left Monterey one Henry A. Phelps of Monterey, an acquaintance of both parties, left that town for St. Petersburg. He knew the respondent had gone there, as it was common talk around town. He had been very friendly with the respondent in Monterey and the petitioner suspected that she was having a clandestine affair with him. He used to come to the petitioner's house frequently to use the telephone. For about two months before the respondent went to Florida she used to go to the neighboring town of Great Barrington every Tuesday and stay all day and all evening. The petitioner observed that she would get home around eleven o'clock at night, and fifteen or twenty minutes after she got home Mr. Phelps, who lived a short distance above them, would arrive home from the direction of Great Barrington. The attitude of the respondent toward the petitioner immediately following these weekly trips to Great Barrington was cool and indifferent.

In January, about ten weeks before the start of the Florida trip, the petitioner arrived home from a trip to New Jersey one night and parked his car some distance from his house, which was dark. Upon arriving at the house the lights went on and he found his wife and Mr. Phelps there. Both appeared very nervous.

Almost immediately upon arriving at St. Petersburg on April 14th Mr. Phelps met the respondent. Thereafter [fol. 62] he saw her frequently, first at the apartment and later at the cottage which she and her children occupied. At first he called on the respondent about once a week at her home, but later these visits increased until he was coming about five times a week. Sometimes he came in the afternoon and sometimes in the evening, and often came for supper. Sometimes he remained after the children went to bed.

The first intimation that the petitioner had that the respondent was not coming back to Monterey was when she wrote him a letter postmarked April 20th, returning the money he had sent her for train fare for herself and the children and informing him that she did not care to come back and live with him.

On July 6th the respondent consulted an attorney in Florida about bringing divorce proceedings. The bill of complaint was drawn up that day and signed by her, the respondent (meaning the libellant in the divorce action) alleging that she was at that time a bona fide legal resident of the State of Florida and had been such for the previous ninety days. The divorce was brought on the grounds of extreme cruelty.

The petitioner (meaning the libellee in the divorce action) received notice of the libel by mail on or about July 10th. Thereupon he retained counsel in Florida to represent him, and in November went to Florida to appear at the divorce hearing. Testimony in the case was taken on November 14th. Mr. Scherrer was not present when his wife testified, though his counsel was. Mr. Scherrer was in a side room. Before Mrs. Scherrer was called as a witness her attorney read into the record a stipulation, subject to the approval of the court, whereby custody of the two children would be in their father during the school year, and in their mother during the

summer vacation. This was agreed to by counsel for Mr. Scherrer. Mrs. Scherrer then gave her testimony and was not cross-examined. Thereafter Mr. Scherrer was brought into the courtroom and questioned by the court as to his ability to look after the children during the [fol. 63] school year, and upon satisfying the Court in that respect the hearing closed, except for the putting in evidence of a deposition of a witness for the purpose of corroborating Mrs. Scherrer's testimony. This deposition was filed on November 29th and made part of the record.

On November 19th Mr. Scherrer returned to Monterey with the children, although the final decree in the divorce action was not entered until November 29th.

Mrs. Scherrer went through a marriage ceremony with Mr. Phelps December 1st, two days after the divorce decree was entered. She and Mr. Phelps at once took up their residence in the cottage which she had been occupying. The respondent was at that time employed as a waitress in a St. Petersburg restaurant and Mr. Phelps was working in a lumber yard. They remained there until shortly after February 1st, 1945, when they left Florida and came north, first going to Westfield, Massachusetts, and thereafter to Monterey, arriving in Monterey on or about February 5th.

They went immediately to the house where she and the petitioner had been living at the time of her departure for Florida. The petitioner had not been living there since a few weeks after she left Monterey, he having gone to live at the home of Sheriff Kinne in Monterey village.

Within a few days after they returned to Monterey Mr. Phelps was served with a writ in a suit for alienation of affections brought by Mr. Scherrer and returnable to the Berkshire County Superior Court April 2, 1945. That case is now pending.

Mr. Phelps' father was in ill health when he left for Florida in April, 1944, but was able to be up and around. Shortly after Mr Phelps left for Florida his father went to live in Great Barrington, and thereafter he lived there part of the time and part of the time with a relative in Westfield. There was no evidence that he

ever came back to Monterey to live. The condition of his health became worse shortly before his son and the respondent left Florida for Massachusetts.

[fol. 64] The respondent, in going to Florida, did not intend to make it her permanent home, but went there with the intention of meeting Mr. Phelps, obtaining a divorce from her husband, and then marrying Mr. Phelps. Her ultimate purpose at all times was to return to Massachusetts after accomplishing these things. The question of her domicile was not made an issue at the divorce hearing. The divorce, in effect, was uncontested. The respondent agreed before the case was heard that the petitioner could have custody of the children during the entire school year, and the petitioner then refrained from contesting the divorce.

F. Anthony Hanlon, Judge of Probate Court.

[File endorsement omitted.]

[fol. 65] In the Probate Court of Berkshire County

[Title omitted.]

Certificate of Court Regarding Presentation of Exhibits to Full Court

I hereby certify that the reproduction of certain exhibits in the above entitled matter in the record would entail burdensome and unwarranted expense and would be impracticable. Said exhibits are as follows:

Petitioner's Exhibit 1. Letter from respondent to petitioner postmarked April 6, 1944.

Petitioner's Exhibit 2. Letter from respondent to petitioner postmarked April 9, 1944.

Petitioner's Exhibit 3. Letter from respondent to petitioner postmarked April 13, 1944.

Petitioner's Exhibit 4. Letter from respondent to petitioner postmarked April 18, 1944.

Petitioner's Exhibit 5. Letter from respondent to petitioner postmarked April 20, 1944.

Petitioner's Exhibit 6. Letter from respondent to petitioner postmarked April 28, 1944.

[fol. 66] Petitioner's Exhibit 7. Letter from respondent to her children postmarked January 9, 1945.

Respondent's Exhibit 1. Citation to appear before Florida Court in divorce proceedings.

Respondent's Exhibit 2. Photostatic copy of Florida divorce proceedings.

F. Anthony Hanlon, Judge of Probate Court.

[File endorsement omitted.]

[fol. 67] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

STIPULATION AS TO CORRECT SPELLING OF NAMES OF PARTIES —Filed May 31, 1946

Now come the parties in the above entitled action and stipulate as follows:

The petitioner, Edward C. Sherrer, is sometimes known as Edward C. Scherrer.

The respondent, Margaret E. Sherrer, is sometimes known as Margaret E. Scherrer, Marguerite E. Sherrer, Marguerite E. Scherrer, Margaret E. Phelps and Marguerite E. Phelps.

Petitioner, by his attorneys Cain, Chesney, Lewis & Capeless. Respondent, by her attorney F. M. Myers.

[File endorsement omitted.]

[fol. 68] IN THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

EDWARD C. SHERRER

vs.

MARGARET E. SHERRER

RESCRIPT—November 4, 1946

Pending in the Probate Court for the County of Berkshire

Ordered, that the register of probate and insolvency in said county make the following entry under said case in the docket of said court; viz.,—

Decree affirmed.

By the Court, Walter F. Frederick, Clerk.

November 4, 1946.

[fol. 69] IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION—November 4, 1946

WILKINS, J. These are two petitions in the Probate Court of Berkshire County, one for a decree that the respondent has deserted the petitioner and that the petitioner is living apart from the respondent for justifiable cause, and the other for the custody of two minor children. From decrees in favor of the petitioner the respondent appeals. The testimony is reported, and the judge in each case made a report of the material facts found by him. G. L. (Ter. Ed.) c. 215, § 11. *Rubinstein* v. *Rubinstein*, 319 Mass. 568, 569. (Mass. Adv. Sh. [1946] 639, 640.) *Coe* v. *Coe*, Mass. Adv. Sh. (1946) 1127, 1128.

1. We first consider an appeal of the petitioner from the denial of his motion to dismiss the respondent's appeal from the decree that the respondent has deserted the petitioner and that the petitioner is living apart from the respondent for justifiable cause. The motion was based upon an alleged failure to comply with G. L. (Ter. Ed.) c. 231, § 135, as amended, which requires that "the party having the obligation to cause the necessary papers * * * to be prepared shall give to the * * * register * * * within ten days after the case becomes ripe for final preparation and printing of the record for the full court, an order in writing for the preparation of such papers and copies of papers for transmission to the full court of the supreme judicial court." The decree was dated October 8, 1945. The respondent made no request of the judge to report the material facts, but the petitioner made such a request on October 11. On October 23 the respondent appealed and filed a transcript of the evidence. On the same day the register received from the respondent a letter containing the following: "Please prepare for transmission to the Supreme Judicial Court all papers required to present appeal of respondent in the matter of [fol. 70] Edward C. Sherrer vs. Margaret E. Sherrer." This was "an order in writing" within the meaning of G. L. (Ter. Ed.) c. 231, § 135. *Bass River Savings Bank* v. *Nickerson*, 302 Mass. 235, 237-238. On November 8 the judge filed a report of the material facts found by him.

As the decree was entirely in favor of the petitioner, and he was not aggrieved thereby, his request for a report of the material facts was not by a "party entitled to appeal" under G. L. (Ter. Ed.) c. 215, § 11. *Donovan* v. *Donovan,* 223 Mass. 6, 7, and cases cited. *Olsen* v. *Olsen,* 294 Mass. 507, 509-510. *Walsh* v. *District Court of Springfield,* 297 Mass. 472, 474. *Ballard* v. *Maguire,* 317 Mass. 130. See *Murphy* v. *Donovan,* 295 Mass. 311, 312, 313. The report of material facts in the case at bar must be taken to have been voluntary. It might never have been made. The mere possibility of its being made could not have availed the respondent as a reason for delay in ordering the preparation of the papers for transmission to this court. Indeed the petitioner does not contend that the order was not timely when given. His contention is rather that the case ceased to be "ripe for final preparation and printing of the record for the full court" (*Moskow* v. *Murphy,* 310 Mass. 249), that the order was vitiated by the subsequent filing of the report of material facts, which was a necessary part of the record on appeal (*Boston Safe Deposit & Trust Co.* v. *Wickham,* 254 Mass. 471, 473; *Martell* v. *Moffatt,* 276 Mass. 174, 177-178; *MacNevin* v. *MacNevin,* 319 Mass. 719, 721, Mass. Adv. Sh. [1946] 795, 796), and that, therefore, the respondent should have given another order for the preparation of the record within ten days after the filing of the report. We do not sustain this contention. The case having once become "ripe for final preparation and printing of the record" did not thereafter lose its ripeness in this respect by the making of a voluntary report of the material facts, even though [fol. 71] such report had to be included in the record for this court. Any other conclusion would "promote confusion and uncertainty of practice" (*Hubbard* v. *Southbridge National Bank,* 297 Mass. 17, 20), and might result in nullifying a printed record at an indefinite future date.[1]

[1] In the Probate Court there is no time limit for the filing of a report of material facts even when made under the statute. See, however, as to the Supreme Judicial Court and the Superior Court, G. L. (Ter. Ed.) c. 214, § 23, as appearing in St. 1945, c. 394, § 1.

By way of precaution we state that we should not be understood as intimating that the requirement that the order be given "within ten days after the case becomes ripe for final preparation and printing of the record for the full court" would preclude the giving of the order before the ten days started to run. See *MacNevin* v. *MacNevin*, 319 Mass. 719; (Mass. Adv. Sh. [1946] 795). See also *Atherton* v. *Corliss*, 101 Mass. 40; *Young* v. *The Orpheus*, 119 Mass. 179, 185; *Reardon* v. *Cummings*, 197 Mass. 128; *Bay State Dredging & Contracting Co.* v. *W. H. Ellis & Son Co.*, 235 Mass. 263, 267-268; *Carey* v. *Casey*, 245 Mass. 12; *Reagan* v. *Mayor of Fall River*, 260 Mass. 529, 531; *Nevins* v. *Board of Public Welfare of Everett*, 301 Mass. 502, 503. Compare *Levine* v. *Finkelstein*, 312 Mass. 483, 485.

There was no error in the denial of the petitioner's motion to dismiss the appeal.

2. We now consider the merits of the petition representing that the petitioner wishes to be enabled to convey his real estate as though he were sole, and alleging that the respondent has deserted the petitioner and that the petitioner is living apart from the respondent for justifiable cause. G. L. (Ter. Ed.) c. 209, § 36. We summarize facts as found by the judge or by ourselves. *Lowell Bar* [fol. 72] *Association* v. *Loeb*, 315 Mass. 176, 178. The parties were married in 1930, in New Jersey, and from 1932 until April 3, 1944, lived together at Monterery in this Commonwealth. On the last mentioned date the respondent, stating that she was leaving for a month's rest, took their two minor daughters with the petitioner's consent to St. Petersburg, Florida. She arrived in Florida April 4. For three weeks she and the children occupied a rented apartment. Thereafter they successively occupied two rented furnished cottages in that city. About April 14, 1944, Henry A. Phelps of Monterery, who for some time had been an intimate friend of the respondent and an acquaintance of the petitioner, and who knew that the respondent had gone to Florida, went to St. Petersburg, where he saw the respondent very frequently. On April 20 the respondent wrote the petitioner, stating that she did not care to go back to live with him, and returning travel money he had sent her. On July 6 she con-

sulted an attorney in Florida, and on the same day signed a bill of complaint for divorce on the ground of extreme cruelty, which alleged that she had been a bona fide resident of Florida for ninety days. The bill of complaint was filed in the Circuit Court of the Sixth Judicial Circuit of Florida in and for Pinellas County. About July 10 the petitioner by mail received formal "notice to appear" by August 7. He retained Florida counsel, who entered a general appearance, and filed an answer, which, among other things, denied the allegations as to residence. Later the petitioner went to Florida, arriving November 9. At that time the respondent was employed as a waitress in a restaurant in St. Petersburg, and Phelps worked there in a lumber yard. On November 14, 1944, there was a hearing in the divorce proceeding, during which the petitioner's attorney was present, but the petitioner remained "in a side room." The respondent's attorney read into the record a stipulation of the parties, which, subject to the approval of the court, provided [fol. 73] that the custody of the children should be in the petitioner during the school term of each year and in the respondent the remainder of each year. The respondent testified and was not cross-examined. The petitioner then entered the courtroom, and was questioned by the judge as to his ability to look after the children, and, when he had satisfied the judge in that respect, the hearing closed except for the deposition of a witness in corroboration of the respondent. On November 19 the petitioner returned to Monterey with the children. On November 29 the deposition was filed, and a final decree was entered awarding the respondent a divorce and awarding custody as stipulated. On December 1 the respondent and Phelps went through a marriage ceremony in Florida. They thereafter resided in the cottage which she had been occupying. Shortly after February 1, 1945, they came to Massachusetts, going first to Westfield, where Phelp's father was ill, and then to Monterey, where they arrived about February 5. There they occupied the house where the respondent and the petitioner had been living at the time of her departure for Florida. The petitioner was living with another family in Monterey. About February 12, 1945, Phelps was served with

a summons in an action brought by the petitioner in the Superior Court, Berkshire County, for alienation of the affections of the respondent.

The judge found: "The respondent, in going to Florida, did not intend to make it her permanent home, but went there with the intention of meeting Mr. Phelps, obtaining a divorce from her husband, and then marrying Mr. Phelps. Her ultimate purpose at all times was to return to Massachusetts after accomplishing these things. The question of her domicile was not made an issue at the divorce hearing. The divorce, in effect, was uncontested. The respondent agreed before the case was heard that the petitioner could have custody of the [fol. 74] children during the entire school year, and the petitioner then refrained from contesting the divorce." The respondent contends that these findings were plainly wrong. It is urged that the findings as to her intent in going to Florida "cannot stand in the light of the evidence." There was testimony tending to show, and the judge found, that the respondent's mother had been committed to a mental hospital; that the petitioner made occasional references to this fact, which were disturbing to the respondent and resulted in friction; that she became nervous and upset; and that a sinus condition from which she suffered became worse. The petitioner testified, "She acted in such a way that I thought telling her about her mother's condition it might straighten her out and help her to mend her ways with the children." The respondent testified that the petitioner told her that she had "a crazy look in * * * [her] eyes just like * * * [her] mother" and that she would be in the same institution as her mother within two years; that her fears about being committed had a bearing upon her decision as to going to Florida; that she intended to stay in Florida when she left; that her statements to the contrary made to her husband, to her daughter, and to friends were falsehoods; that she went to Florida on her doctor's advice; that she could not "stand it any longer"; that she could have gotten a divorce here, but "had to get away"; that her elder daughter attended school in Florida; that at the time of her marriage she intended to make her home permanently in Florida; that she considered her position as a waitress in a restaurant "a

permanent job"; that she and Phelps returned to Massachusetts as a result of a letter to him advising of the serious illness of his father; that they remained in Massachusetts because of the action for alienation of affections; and that they kept the cottage in Florida for a month after February 5, 1945. The judge was not [fol. 75] required to accept the respondent's testimony that her statements that she was leaving Massachusetts temporarily had been falsehoods. This is the usual situation of conflict in testimony. Nor were the findings open to the objection that mere disbelief of testimony does not constitute proof of facts to the contrary. See *Zarrillo* v. *Stone*, 317 Mass. 510, 512. A requirement for instituting divorce proceedings in Florida is that "the complainant must have resided" there for ninety days. Fla. Sts. (1941) § 65.02. This means domicil and not mere residence. *Wade* v. *Wade*, 93 Fla. 1004, 1007. See *Andrews* v. *Andrews*, 176 Mass. 92, 93-94; *Cohen* v. *Cohen*, 319 Mass. 31, 34 (Mass. Adv. Sh. [1946] 41, 43); *Williams* v. *North Carolina*, 325 U. S. 226, 229. The bill of complaint was signed by the respondent within a few days after the expiration of the minimum residence requirement. The fact that a wife leaves her husband and goes into another State, and there applies for a divorce soon after she is able to do so, warrants the inference that she goes there for that purpose. *Lyon* v. *Lyon*, 2 Gray, 367. *Chase* v. *Chase*, 6 Gray, 157, 162. "In *Smith* v. *Smith*, 13 Gray, 209, the presumption arising from such a fact is said by Chief Justice Shaw to be 'violent, if not conclusive.' See also *Sewall* v. *Sewall*, 122 Mass. 156." *Dickinson* v. *Dickinson*, 167 Mass. 474, 477. The early application for divorce and other evidence as to her intention amply justified the judge's finding by implication that she was not domiciled in Florida. *Commonwealth* v. *Kendall*, 162 Mass. 221. *Williams* v. *North Carolina*, 325 U. S. 226, 236-237.

The next contention is that the Probate Court decree was a denial of full faith and credit to the Florida divorce decree. The respondent relies upon *Davis* v. *Davis*, 305 U. S. 32, a case which we have interpreted "as resting on the basis that the jurisdictional facts were actually litigated and determined to exist in the court granting the [fol. 76] divorce." *Cohen* v. *Cohen*, 319 Mass. 31, 35 (Mass. Adv. Sh. [1946] 41, 44). *Bowditch* v. *Bowditch*,

314 Mass. 410, 416. *Rubinstein* v. *Rubinstein*, 319 Mass. 568, 571 (Mass. Adv. Sh. [1946] 639, 642). *Coe* v. *Coe*, Mass. Adv. Sh. (1946) 1127, 1133. The allegation as to residence in the bill of complaint, which was denied in the answer, did not constitute an actual litigation of the jurisdictional facts. We do not think that a different result was required because there was testimony on this subject from witnesses called by the respondent or because the petitioner's counsel was present without participating in the examination of the witnesses. An examination of the record shows that the judge's finding that the divorce was uncontested was not plainly wrong. The ruling in *Davis* v. *Davis*, 305 U. S. 32, was based chiefly upon decisions in cases not involving the marital relation and in which the paramount rights of the State were not involved (page 42). Any extension of that ruling to comprehend the facts of the present case, which disclose nothing more than an agreement as to custody and a formal uncontested hearing, must come from the court which first pronounced that doctrine. In our opinion, to recognize the Florida decree as controlling in spite of facts which show that neither party was domiciled in that State would allow the parties, who are domiciled in this Commonwealth, to agree upon and achieve an undoing of their marriage by a specious indirection. We think that the judge's finding is not precluded by § 1 of art. 4 of the Constitution of the United States. *Andrews* v. *Andrews*, 188 U. S. 14, 41. *Williams* v. *North Carolina*, 325 U. S. 226, 238. *Esenwein* v. *Commonwealth*, 325 U. S. 279, 280-281.

3. There remains for consideration the decree respecting custody of the daughters, Beverly, aged eleven, and Gail, aged six. The court had jurisdiction to enter the decree under G. L. (Ter. Ed.) c. 209, § 37. *Gallup* v. *Gallup*, 271 Mass. 252, 257. *Bergeron* v. *Bergeron*, 287 Mass. [fol. 77] 524, 530. The paramount issue is the welfare of the children. *Grandell* v. *Short*, 317 Mass. 605, 608. *Erickson* v. *Raspperry*, Mass. Adv. Sh. (1946) 1169, 1171, and cases cited.

The judge made a separate report of the material facts found by him in this matter. We briefly state his findings other than those relating to the Florida divorce. The children and the petitioner lived with a family in a house in Monterey until the latter part of June. At that time

the respondent went to that house during the absence of the petitioner, and forcibly removed Gail to the house in Monterey where Phelps and the respondent were living. Gail remained there in the actual custody of the respondent until about two weeks before the hearing (which took place November 7, 1945), when the respondent and Gail disappeared. Their whereabouts at the time of the hearing on the petition for custody were unknown. The judge also found in effect that the environment for the children with the father was proper, and that the house where Phelps and the respondent lived was an improper place for Gail to live. As to this factor the judge found, "The divorce having been found invalid, the respondent and Henry Phelps are not man and wife, and the consequent public scandal of their living under the same roof provides an atmosphere of immorality which is unhealthy for Gail." The findings were not plainly wrong and must stand.

Decrees affirmed.

[fol. 78] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 937

ORDER ALLOWING CERTIORARI—Filed March 3, 1947

The petition herein for a writ of certiorari to the Probate Court for the County of Berkshire, Commonwealth of Massachusetts, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

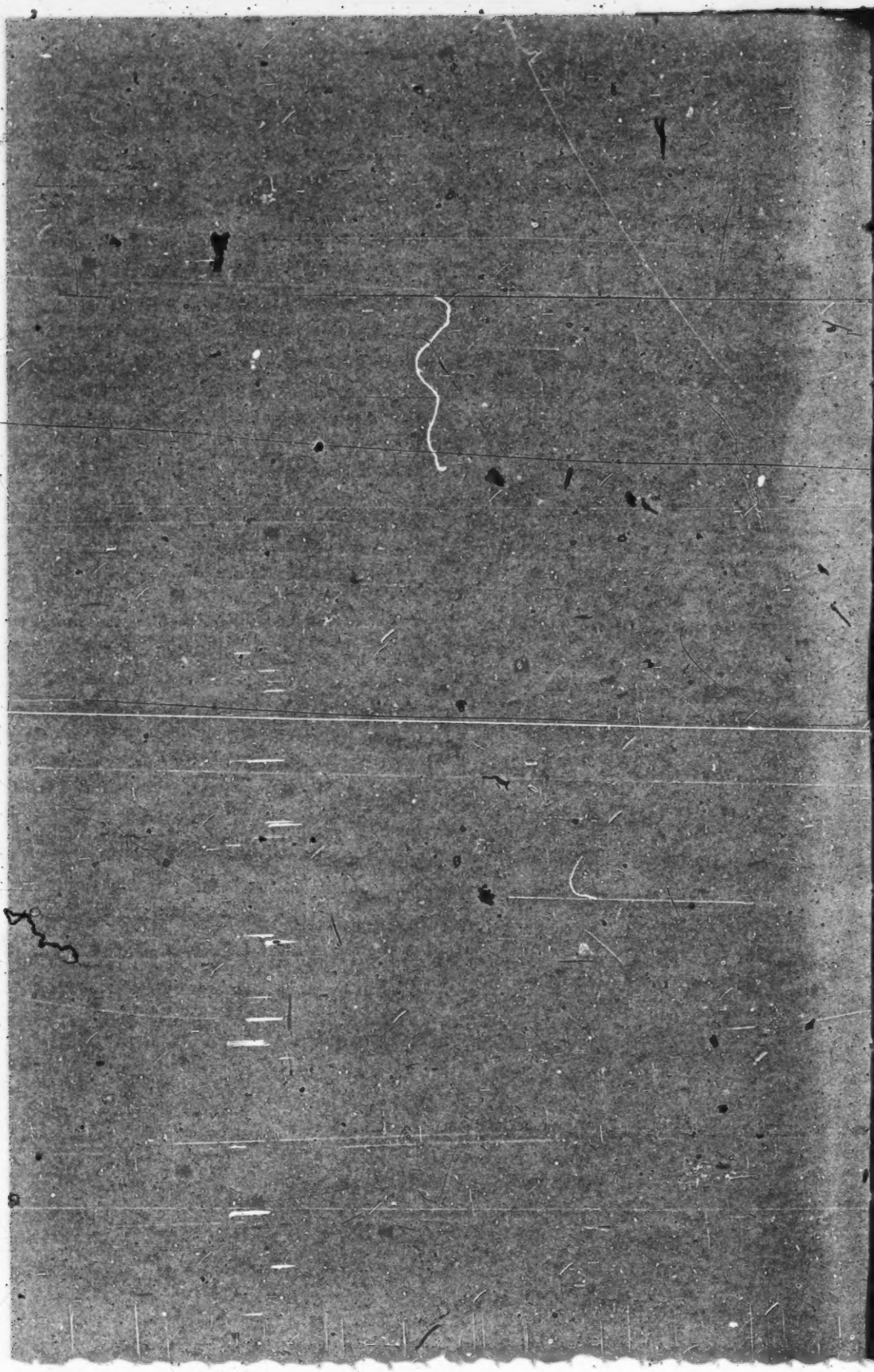
No. 937

MARGARET E. SHERRER
Petitioner.

EDWARD C. SHERRER

PETITION FOR WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF BERKSHIRE, COMMONWEALTH OF MASSACHUSETTS, AND BRIEF IN SUPPORT THEREOF.

FREDERICK M. MYERS,
FRANCIS J. QUIRICO,
Counsel for Petitioner.



INDEX

Subject Index

Cases Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

MARGARET E. SHERRER

Petitioner.

v.

EDWARD C. SHERRER

PETITION FOR WRIT OF CERTIORARI

Now comes Marguerite E. Sherrer and respectfully petitions this Court to allow and issue a writ of certiorari to require that there be certified to this Court for review and determination the cause, the record of which remains in the Probate Court for the County of Berkshire, Commonwealth of Massachusetts, numbered 52914, wherein the petitioner is the respondent and the respondent is the petitioner, and wherein final judgment has been entered under a decision of the Supreme Judicial Court for the said Commonwealth, reported in Massachusetts decisions, Advance Sheets (1946) page 1193.

This action was brought by the respondent in the said Probate Court for the County of Berkshire for a decree that the petitioner had deserted the respondent and that the respondent was living apart from the petitioner for

justifiable cause. In answer the petitioner alleged that she had been divorced from the respondent under a decree entered by a Florida court at a time when she was a resident of Florida and in a divorce proceeding in which the respondent had participated personally and through counsel, and by his answer specially putting in issue the matter of her domicile in Florida.

The reasons relied on by this petitioner for the allowance of the writ are as follows:—

I.

To permit the respondent to attack the validity of the Florida decree violated the full faith and credit provisions of the United States Constitution in the following respects:—

(a) The domicile of the petitioner was in issue under the pleadings in the Florida court, having been specially alleged by the petitioner and specially denied by the respondent.

(b) The respondent had appeared, filing answer denying domicile, and had been present in court at the hearing on the divorce and the issue of domicile was, therefore, res judicata as to the respondent.

(c) The facts showed that the petitioner was actually domiciled in Florida within Florida requirements at the time the divorce was granted.

II.

The action of the Supreme Judicial Court of Massachusetts in affirming the decree entered in the Probate Court of the County of Berkshire is grounded on the finding that the Florida divorce was invalid and is, therefore, a denial of full faith and credit to that decree in conflict with Section 1 of Article 4 of the United States Constitution and also in conflict with the decisions of this Court in *Davis v. Davis*, 305 U. S. 32, 40 and *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U. S. 522, 524ff.

FREDERICK M. MYERS,

FRANCIS J. QUIRICO,

Counsel for Marguerite E. Sherrer.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

MARGARET E. SHERRER

Petitioner.

v.

EDWARD C. SHERRER

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A.

Authority for the Issuance of the Writ.

This case involves the question whether the Massachusetts courts have failed to give full faith and credit to a judgment of a Florida court by refusing to recognize the validity of a Florida divorce and also involves the subsidiary question whether there was a violation of the Full Faith and Credit Clause in permitting the respondent to attack the domiciliary finding made by the Florida court in view of the respondent's participation in the Florida proceedings. A question involving the Constitution of the United States is presented.

B.

Summary of the Points Presented.

The State court has failed to follow the construction required by the decisions of this Court as to the effect of the Full Faith and Credit Clause of the Constitution in the following particulars:—

1. It has failed to give due weight to the fact that, by reason of the participation by the respondent in the proceedings in the Florida Court, the question of the petitioner's domicile was res judicata as to the respondent.

2. In arriving at the finding that the petitioner was not domiciled in Florida, the State court has given no effect to the principle established by the decisions of this Court that the burden was on the respondent to show a lack of jurisdiction in the Florida court.

C.

The State Court Has Failed to Give the Proper Effect to the Fact of the Respondent's Participation in the Florida Proceeding, and has erred in reversing the Florida finding of domicile.

1. In the absence of fraud and collusion when a party has taken part in litigation, there is no more right to relitigate the question of domicile than any other question put in issue by the pleadings.

Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 524.

Davis v. Davis, 305 U. S. 32, 42.

Williams v. North Carolina, 325 U. S. 226, 230.

The record shows that the respondent retained Florida counsel, entered a general appearance, filed an answer which among other things denied allegations as to the petitioner's residence; that he was present in court during the hearing in the divorce proceeding, although he remained "in a side room"; that his attorney was present throughout the hearing but did not cross-examine the petitioner. (Record, Page 10).

The statement in the court's opinion that the ruling in *Davis v. Davis* "was based chiefly upon decisions in cases not involving marital relations" (Record, Page 64) disregards the fact that that case was itself a case involving the validity of a divorce decree.

There was no evidence of collusion or fraud on the court in this case nor does the Massachusetts court make a finding to that effect. If the law is established as set forth in this case a party who, absent fraud or collision, has arrived at the decision that the controverted allegations as to domicile are well founded and, therefore, refrains from cross-examination on that issue is left in a more favorable position than one who doubts the allegation and vigorously but unsuccessfully contests that issue.

2. The finding that there was no domicile in Florida and that the petitioner intended to return to Massachusetts after getting her divorce is in total disregard of the rule that the burden of proof was on the respondent to show lack of jurisdiction in the Florida court.

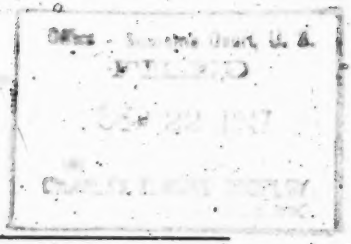
Esenwein v. Commonwealth, 325 U. S. 279, 280.

The record is barren of any evidence to show an intent on the petitioner's part contrary to the intent testified to by her and the mere fact, relied upon by the court, that she brought her petition for divorce at the expiration of the statutory period of residence in Florida does not justify such a finding in view of the other evidence.

FREDERICK M. MYERS,

FRANCIS J. QUIRICO,

Counsel for Marguerite E. Sherrer.



No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

MARGARET E. SHERRER, Petitioner

v.

EDWARD C. SHERRER

ON WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF BERKSHIRE, COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR PETITIONER

FREDERICK M. MYERS
FRANCIS J. QUIRICO
Attorneys for Petitioner

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 36

MARGARET E. SHERRER, Petitioner

v.

EDWARD C. SHERRER

ON WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF BERKSHIRE, COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts (R. 58-65) is reported in 1946 Advance Sheets (Mass.) 1193.

Jurisdiction

The rescript below was entered November 4, 1946 (R. 57). The petition for writ of certiorari was filed January 22, 1947, and was granted March 3, 1947. The jurisdiction of this Court is invoked under § 237 (b) of the Judicial Code, 28 U.S.C.A. § 344 (b).

Questions Presented

1. Whether, in the absence of fraud and collusion, a final divorce decree obtained in a State Court proceeding in which both parties have appeared, filed pleadings and participated personally and by counsel, can be held invalid by another State in a suit between the same parties in view of the Full Faith and Credit Clause, Article 4, § 1 of the United States Constitution, and provisions of the Federal Statute 28 U.S.C.A., § 687.

2. Whether, under the Full Faith and Credit Clause and the Federal Statute above referred to, a party to a divorce action in one State, who has appeared generally and has specially denied the question of the Court's jurisdiction, and has later participated in the action personally and by counsel without appeal, can relitigate the question of the first Court's jurisdiction in a proceeding in another State.

3. Whether, after a party to a divorce action has appeared generally in that action, filed an answer specially denying the other party's domicile, and later taken part in the proceedings without appeal, the refusal to hold that the questions of domicile and jurisdiction have become

res judicata to him on the ground that there was no actual contest on that issue, constitutes a violation of the Full Faith and Credit Clause and the provisions of the Federal Statute.

4. Whether the failure of the Court of one State to apply the criteria and standards of proof laid down by this Court as applicable to the final decree of another State, constitutes a violation of the Full Faith and Credit Clause and the provisions of the Federal Statute.

5. Although the point is not raised in the opinion of the Court below, the case may be considered to raise the question, by implication, whether the policy of Massachusetts as set forth in its Statute, G. L. (Ter. Ed.) c. 208, § 39 justified it in refusing to give Full Faith and Credit to the Florida decree.

Statutes Involved

The pertinent provisions of 28 U.S.C.A. § 687, and of the Massachusetts Statute. G. L. (Ter. Ed.) c. 208, § 39 are set out in the Appendix, p. 22

Statement

The Sherrers were married in New Jersey in 1930 and lived together in Massachusetts until April 3, 1944. Two children were born of their marriage. The wife's mother had been committed to a mental hospital, and the husband repeatedly taunted the wife with references to her mother's condition and with threats to have her committed (R. 15, 52, 62). She became nervous and upset, a

sinus condition became worse and her doctor advised that she go to Florida (R. 12, 16). The wife consulted Massachusetts counsel as to her rights, and as to the possibility of her establishing a residence in Florida and getting a divorce there. She was advised it was possible to get a divorce in Massachusetts or to take up residence in Florida and get one there (R. 16).

On April 3, 1944, the wife took the two minor children to Florida. On arriving at St. Petersburg, April 4, 1944, she and the children occupied a rented apartment for three weeks; thereafter, they successively occupied two rented furnished cottages in that city (R. 24, 53, 60), the children being with her until November 19, 1947, and the wife continuing occupancy until February 5, 1945.

The wife secured employment in St. Petersburg beginning the next month after her arrival and was continuously employed until she left in February 1945.

She placed the older child, then ten years old, in school in St. Petersburg within two weeks after she arrived in Florida and kept her in school as long as the child was in Florida (R. 21, 33).

On July 6, 1944 the wife consulted a Florida attorney and filed a libel for divorce on the grounds of extreme cruelty. The husband on July 10, 1944, received formal notice to appear by August 7, 1944. He retained Florida counsel, who entered a general appearance and filed an answer, which, among other things, denied the allegations as to residence. The husband came to Florida November 9, 1944. On November 14, there was a hearing in the

divorce proceeding, during which the husband's attorney was present, but the husband remained "in a side room." The husband's attorney read into the record a stipulation of parties which had to do with the custody of the children, the wife testified. The husband entered the court room and was questioned as to his ability to look after the children, and thereupon the hearing closed, except for a deposition which was to be presented in corroboration of the wife's testimony. On November 19, the husband returned to Massachusetts with the children. On November 29, the deposition was filed and final decree was entered awarding the wife a divorce and awarding custody as stipulated. On December 1, the wife married one Phelps. She and Phelps thereafter resided in St. Petersburg in the cottage which she had formerly been occupying with the children. Phelps had been in Tampa, Florida, since April 14 (R. 40) and was working in a lumber yard there. At the time of his marriage to the petitioner it was the intention of both the wife and Phelps to make their home in Florida (R. 17, 37). The wife and Phelps continued to reside in St. Petersburg, she working as a waitress in a restaurant, and Phelps at a lumber job, until they were summoned back to Monterey on or about January 28, 1945 by a letter advising Phelps of the serious illness of his father (R. 34, 38, 63). On receipt of the letter they came back to Monterey and went to the house in which the petitioner and respondent had been living prior to April 1944, arriving February 5, 1945. About February 12, 1945, before the father's condition had changed for the better and while the wife and Phelps were

still in Monterey, Phelps was served with a writ in an action for alienation of affections and loss of consortium brought by the respondent, Sherrer, ad damnum $15,000., returnable to the Berkshire County (Massachusetts) Superior Court April 2, 1945 (R. 39, 61). The wife and Phelps decided to remain in Massachusetts until the case could be tried. They had retained the St. Petersburg cottage at the time of leaving for Monterey and did not give it up until about a month after the summons was served in the alienation suit (R. 19, 24, 25).

The wife represented to the respondent, both at the time of her leaving for Florida in April 1944, and by letters sent to him while she was there up to April 20, that she was only in Florida for a visit. Her reason for such representations was that she feared he would hold her in Massachusetts if he knew her true intent (R. 31) and her fear of his having troopers after her in Florida (R. 31). On April 20 (Exhibit 5, R. 11, 56) she wrote him she was not coming back, she would not live with him (R. 11).

On June 28, 1945, the husband brought an action in the Berkshire County Probate Court against the wife alleging he was living apart from her for justifiable cause in that the wife, in order to evade the laws of Massachusetts, obtained an invalid divorce decree in the State of Florida and entered into a void marriage with one Henry Phelps, that said divorce and subsequent marriage were invalid, illegal and void. The Berkshire County Probate Court decreed that the husband was living apart for justifiable

cause as set forth in the petition. From that decree the wife appealed to the Massachusetts Supreme Judicial Court, which sustained the decree.

Specification of Errors

The Court below erred:—

1. In permitting the respondent to relitigate the question of the jurisdiction of the Florida Court in spite of his having participated personally and by counsel in the Florida proceedings.

2. In holding, in spite of *Davis v. Davis*, 305 U.S. 32, that a matter covered by a judgment is not res judicata as between the original parties to that judgment, so long as it was not 'actually litigated.'

3. In failing to test the Florida judgment on the theory that it must be supported unless lacking in foundation.

4. In holding that the burden of proving the validity of a foreign divorce decree was on the person relying thereon.

Summary of Argument

A. Failure to give the effect of an estoppel by judgment to a judgment rendered in a sister state is a denial of Full Faith and Credit to that judgment within the provisions of the Constitution.

B. As between the parties, a judgment has finality not only as to every matter which was offered to sustain or defeat the demand but also as to every ground which

might have been presented, and the requirement by the Massachusetts Court that there be 'actual' litigation of the issue is unjustifiable.

C. The doctrine of res judicata applies no less to a question of domicile than to any other question which may be involved in a case.

D. Refusal to test the validity of a judgment of a sister state in accordance with the principles and criteria laid down by this Court is a denial of Full Faith and Credit to that judgment.

E. The provisions of the Massachusetts Statute (G. L., c. 208, § 39) afford no justification for denying Full Faith and Credit to a divorce decree rendered in Florida to parties formerly domiciled in Massachusetts.

Argument

A. The failure of the Massachusetts Court to give effect as res judicata to the estoppel by judgment of the decree rendered against the respondent in the Florida Court constitutes a violation of the Full Faith and Credit Clause.

In *Bates v. Bodie*, 245 U.S. 520, a husband had sued his wife for divorce in Arkansas, alleging cruelty. The wife had filed an answer and a cross complaint accusing him of cruelty and seeking alimony. The husband's suit was dismissed and a divorce and alimony granted in the wife's suit. The decree recited that the judgment was rendered by the husband's consent on condition there be no appeal. The wife later sued the husband in Nebraska alleging

that he was the owner of Nebraska land and that because the Arkansas Court had no jurisdiction to take the Nebraska land into consideration, the decree did not bar the second action. The Court said at Page 526, "And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided but of what might have been decided." On p. 531, the Court further said, "We think, therefore, that due faith and credit required by the Constitution of the United States, was not given to the decree."

B. As between the parties, a judgment has finality not only as to every matter which was offered to sustain or defeat the demand but also as to every ground which might have been presented, and the requirement by the Massachusetts Court that there be 'actual' litigation of the issue is unjustifiable.

1. Both on principle and by a long line of decisions of this Court, it is clear that the doctrine of res judicata operates through estoppel by judgment as to every matter which might have been presented in the suit, whether actually litigated or not. *Cromwell v. County of* Sac, 94 U.S. 351; *Grubb v. Public Utilities Commission*, 281 U.S. 470, 479; *Chicot Drainage District v. Baxter State Bank*, 308 U.S. 371, 375; *Heiser v. Woodruff*, 327 U.S. 726, 733; *New York vs. Halvey*, 91 L. Ed. Adv. Ops. 793.

Cromwell v. County of Sac, supra, is one of the cases most frequently cited as to the effect of a prior judgment between the parties as to every matter which might have been litigated. The question before the Court related to whether a plaintiff, who had brought one action on certain County bonds and had been found not to be a holder before maturity for value, was barred by that judgment from showing in a second suit on other bonds of the same series that he had acquired these other bonds for value before maturity.

The Court (Field, J.) said on p. 352, "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . . . The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly

accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

In *Grubb v. Public Utilities Commission*, *supra*, this Court (VanDevanter, J.) said at p. 479, "He (the appellant) was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. . . . As the ground just described was available but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end."

In *Chicot County Drainage District v. Baxter State Bank*, *supra*, the question presented was whether bondholders, who had been parties to a proceeding in which they had not raised the question of the constitutionality of a pertinent statute, could not later relitigate the question merely because the statute had been held unconstitutional subsequent to the judgment in the first suit. Chief Justice Hughes said at p. 378, "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and

in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.'"

In *Heiser v. Woodruff*, *supra*, this Court did inquire into the extent to which a claim had been litigated in Bankruptcy Court but, in its opinion, said, "In general, a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."

In *New York v. Halvey*, *supra*, this Court (Douglas, J.) stated that the general rule is that this command (the Full Faith and Credit Clause) requires the judgment of a sister state to be given full, not partial, credit in the State of the forum.

§10 of the Restatement on Judgments relates to Res Judicata and Jurisdiction over the Subject Matter. Comment c. states that where the question of jurisdiction is not actually litigated, the rule stated, namely, that the matter is res judicata as between the parties, is still applicable, "the court and the parties assuming that it has jurisdiction. The rule is not applicable if there is no litigation of any issue, even though the defendant by his

appearance or otherwise is subject to the jurisdiction of the court. It is applicable, however, if issues are litigated in which the jurisdiction of the court is assumed though not contested."

The illustration given relates to a case where the constitutionality of a statute was assumed and not contested. The party to the action is "precluded by the prior judgment" from later attacking the constitutionality of the statute in a second action even though subsequent to the first action the highest court had determined the statute to be unconstitutional.

2. If by litigation a party can be put in a position where as to him the jurisdictional question has become res judicata (as to which see discussion under C *infra*) there is no reason why he may not be put in that same position by his consent. Judgments based on consent have been enforced under the Full Faith and Credit Clause in several cases which have come before this Court. *Bates v. Bodie* (*supra*), 245 U.S. 520, 531; *Yarborough v. Yarborough*, 290 U. S. 202; *Davis v. Davis*, 305 U.S. 32.

In *Bates v. Brodie*, *supra*, at p. 531, the Court points out that the judgment had been rendered with the consent of the parties and said it was admitted that such consent was sufficient to give jurisdiction on which to base an alimony decree.

In *Yarborough v. Yarborough*, *supra*, the question was whether a Georgia consent judgment making settlement

of alimony and providing for the support of a minor child could be upset in North Carolina at the suit of that child. The child had not been a party to the Georgia suit but the mother had participated in it. The Court (Brandeis, J.) said at p. 210, "By the Georgia law, a consent (or other) decree in a divorce suit fixing permanent alimony for a minor child is binding upon it." On p. 211, the Court said, "Moreover, this is not a case where the scope of the jurisdiction acquired by the Georgia court rests upon the effectiveness of service by publication upon a non-resident. Mrs. Yarborough filed a cross-bill, as well as an answer; and in the cross-bill prayed 'that provision for permanent alimony be made for the' support and education of Sadie. Thus the court acquired complete jurisdiction of the marriage status and, as an incident, power to finally determine the extent of her father's obligation to support his minor child."

In *Davis v. Davis*, *supra*, the question was whether, after a wife had specially pleaded lack of jurisdiction of the Virginia Court on the ground that the husband had no domicile there, the District of Columbia could disregard the Virginia judgment. The Court held that under the Full Faith and Credit Clause, the judgment was binding upon the wife. At p. 42, the Court (Butler J.) points out that, while the wife's appearance was special for the sole purpose of challenging jurisdiction, the fact was that she had participated in the litigation and acquiesced in the orders of the court relating to the merits. The Court says at p. 43, "Considered in its entirety the

record shows that she submitted herself to the jurisdiction of the Virginia Court and is bound by its determination that it had jurisdiction of the subject matter and of the parties."

The effect of filing a general appearance is no less a consent to the Court's determining the jurisdictional question than as if the matter had become the subject of judgment through litigation or by special consent.

It has always been clear that a person may subject himself to the jurisdiction of a court by consenting to that court's exercising jurisdiction over him. Restatement, Judgments, § 18, 19.

If a special appearance, as in *Davis v. Davis, supra*, is sufficient to give the Court jurisdiction to issue a decree binding on the parties, there is no reason for holding that a general appearance will do anything less. Such a holding would put the party who determined, after examining into the question of domicile, that there was nothing to be gained by contesting that point, in a better position than the party who fought the question of domicile from the beginning of the litigation and through every court.

3. The proposed test as to 'actual' litigation is unsound because of its ambiguity and uncertainty. If it means there must be a forensic contest, the question immediately arises as to how far that contest must go before it becomes 'actual'. Must both parties introduce evidence? Must both attorneys examine and cross-examine? Must the losing party exhaust his rights of appeal? Will the fact

that there is a stipulation of parties as to some phase of the case remove the case from the 'actual' litigation category? These are not idle questions. If the suggested test is to be imposed someone must decide, and there must be some standard for decision, as to when a case falls on one side or the other. What about the situation arising when counsel for a party concludes as the result of his investigation that as to some issue, perhaps that of domicile, the petitioner's story is well founded, and therefore he will contest only on some other ground. Will the Court conduct its own investigation and substitute its judgment as to how the case should have been handled for that of counsel?

Will this Court examine the full record in every case which comes up under the Full Faith and Credit Clause? If the whole question of violation of the Full Faith and Credit Clause depends on whether there has been actual litigation, the losing party will have the right to have this Court determine that question.

Petitioner submits that there is no justification for this Court to depart from the clear and definite rules long established as to estoppel by judgment in favor of some uncertain standard which will be determined by a different yardstick by every Court in which the problem is presented.

C. The doctrine of res judicata applies no less to a question of domicile than to any other question which may be involved in a case.

American Surety Co. v. Baldwin, 287 U.S. 156,166; *Davis v. Davis*, 305 U.S. 32; *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78.

As this Court said in *Treinies v. Sunshine Mining Co., supra*, "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties."

In the opinion of the Court below, it is said "The ruling in *Davis v. Davis*, 305 U.S. 32, was based chiefly upon declarations in cases not involving the marital relation and in which the paramount rights of the State were not involved." (R. 64); Mass. 1946 Adv. Sheets, 1200. Inasmuch as the *Davis* case was itself a case involving the marital relation, the statement quoted can only be interpreted as questioning the wisdom of making the rule as to res judicata apply to jurisdictional matters, litigated or not, in divorce cases. There is, of course, no ground for such a distinction. If jurisdiction depends on domicile, domicile can be determined as readily in a divorce action as in any other litigation.

D. By its refusal to test the validity of the Florida judgment in accordance with the principles and the criteria laid down by this Court, the Massachusetts Court has denied Full Faith and Credit to the Florida judgment.

In considering the Florida divorce, the Court below did not give to that decree even as much weight as it would have given to a jury verdict. The only question as

to weight of testimony posed by the Court's opinion is whether there was sufficient in the evidence to justify the findings of fact made by the Judge of the Probate Court. The opinion says, "The judge was not required to accept the respondent's (wife's) testimony." (R. 63), and again, "An examination of the record shows that the judge's finding that the divorce was uncontested was not plainly wrong." (R. 64).

Obviously the Court below applied the rule it previously laid down in *Bowditch v. Bowditch*, 314 Mass. 410 at 415, 416, "One who relies upon a foreign divorce must not only plead and prove it, but must also prove his bona fide domicile at the time the divorce relied upon was granted in the foreign state." This action is in square conflict with the rule as laid down by this Court. In *Williams v. North Carolina*, 325 U.S. 226 at 233, this Court (Frankfurter, J.) said, "The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owned by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicile and therefore a want of power in the court rendering the judgment. What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached."

One will search in vain in the record in the case at bar for any indication that inquiry was made into the question whether there was "want of foundation for the con-

clusion" that the Florida Court reached. Had that test been applied instead of the test whether there was any scintilla of evidence to support the Massachusetts Probate Court Judge's finding, there could be no doubt that the record furnished ample evidence to support the Florida decree. By every test of domicile, petitioner had acquired a domicile in Florida prior to the time of her seeking a divorce there. Her residence, her job, her religious affiliations, her children's schooling and her intent all coincided to make St. Petersburg her home. Even if the petitioner's acts after obtaining the divorce be examined as bearing upon her intent at the time of her coming to Florida, then even by that test, the fact that the petitioner stayed in Florida for two months after the divorce was obtained is evidence to support the Florida domicile. There was no sufficient evidence in the case to sustain the overturning of the Florida decree if the burden of proof had been placed on the husband.

E. The Massachusetts Statute, General Laws (Ter. Ed.) c. 208 § 39, does not justify denying Full Faith and Credit to the Florida decree.

The reference in the opinion below to the "paramount rights of the State" (R. 64) may possibly be taken as meaning that Massachusetts refused to recognize the Florida decree because of the provisions of the Statute above referred to. If that view be taken it is submitted that such action was in direct conflict with the decisions of this Court.

In *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 440, it was held that the Full Faith and Credit Clause required the enforcement in Lousiana of a judgment recovered in Texas under the Texas Workmen's Compensation Law by a Louisiana resident, even though the Louisiana Statute would have given the plaintiff employee a more liberal award than that given by the Texas Court.

In *United Commercial Travelers v. Wolfe*, 91 L. Ed. Adv. Ops. 1245, it was held that a South Dakota statutory provision invalidating every contractual attempt to shorten the period of limitations must yield to an Ohio judgment based on a requirement in a society's constitution that action must be brought within six months.

In *Yarborough v. Yarborough*, *supra*, at p. 219, this Court said "due process of law will not permit a state, by its judgment, to inflict parties 'with a perpetual contractual paralysis' which will prevent them from altering outside the state their contracts or ordinary business relations entered into within it."

To hold that the Massachusetts statute above referred to is in itself sufficient ground to bar the petitioner from relying upon the Florida decree is to inflict the "contractual paralysis" condemned by the above opinion.

Conclusion

The petitioner asks that this Court lay down the doctrine that estoppel by judgment applies to make a divorce decree res judicata as to the original parties and their privies in every case in which both parties appear and

participate in person or by counsel to the same extent that any other decree becomes res judicata, and that the anomalous requirement that there be actual litigation before a litigant is bound by a judgment be held to be unsound and meaningless. It is submitted that this Court is the one which should declare what the Federal law as to estoppel by judgment is. To give it the meaning contended for will cure the situation described by Mr. Justice Black in his dissenting opinion in the second *Williams* case, *supra*, at p. 264.

Once a definite rule is established by which one can know that a divorce is valid or invalid, we shall have stability in place of the present chaos and the Full Faith and Credit Clause will become a nationally unifying force as to divorce decrees rather than a force nationally distruptive.

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Appendix

28 U.S.C.A. § 687 ..... And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

Massachusetts, G. L. (Ter. Ed.) c. 208 § 39 ..... A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth.

No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

MARGARET E. SHERRER, Petitioner

v.

EDWARD C. SHERRER, Respondent

ON WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF BERKSHIRE, COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT

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INDEX

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BRIEF FOR RESPONDENT

Statement

The Report of Material Facts filed by the trial judge and found on page 52 of the Record, also the summary

of the facts found by the trial judge and the Massachusetts Supreme Judicial Court (R., page 60), are hereby referred to as the true statement of facts. We do not fully accept the Statement in the petitioner's brief, regarding it in the nature of a summary of the evidence, much of which was rejected by the two courts, rather than a statement of facts as found by the courts. We refer especially to the statement on page 5 of the petitioner's brief that: "at the time of his marriage to the petitioner it was the intention of both the wife and Phelps to make their home in Florida." This is the very opposite of the finding of the trial court on page 56 of the Record that: "Her ultimate purpose at all times was to return to Massachusetts after accomplishing these things." This is also true of the statement on page 6 of the brief that: "Her reason for such representations was that she feared he would hold her in Massachusetts if he knew her true intent."

Summary of Argument

1. Where the issue of domicil was not contested by the spouses in the divorcing state, another state may refuse to recognize the divorce decree if its courts find that the libellant did not have domicil in the divorcing state.

2. Where the issue of domicil was contested by the spouses in the divorcing state, another state may refuse to recognize the divorce decree in a case where the state itself or a third person is a party, if its courts find that the libellant did not have domicil in the divorcing state.

3. Where the issue of domicil was contested by the spouses in the divorcing state, another state may refuse to recognize the divorce decree even in a case where the spouses are the parties, if its courts find that the libellant did not have domicil in the divorcing state.

4. In the instant case, a contest sufficient to bar Mr. Sherrer on the issue of domicil did not take place in Florida.

5. The burden of establishing the invalidity of the Florida decree was assumed by Mr. Sherrer from the time the decree was introduced into evidence by Mrs. Sherrer.

Argument

1.

The starting point for the rule of law applicable to this case, as we see it, is the decision of this court in the case of *Williams v. North Carolina*, 325 U.S. 226, hereafter referred to as the second Williams v. North Carolina or as "the Williams case". There it was held that where one state grants a decree of divorce to a party in an uncontested action, the full faith and credit required by Article IV, Section 1 of the Constitution of the United States is not lacking when a second state on its own inquiry decides that the necessary jurisdictional fact of domicil, assumed or found by the first state to be present, actually was absent and therefore denies effect to the decree. The problem presented by the Williams case was to reconcile the reciprocal respect looked for under

the Full Faith and Credit Clause with the fact that regulation of marriage and divorce is, under the Constitution, left to the individual states. It was the decision of the court that "to permit the necessary finding of domicil by one state to foreclose all states in the protection of their social institutions would be intolerable". Hence it was open to each state to make its own inquiry into the jurisdictional facts and having given due regard to the existence of the other state's decree with its recital of jurisdiction, to reach, if the facts warrant it, a conclusion that the first state lacked jurisdiction.

2.

The decision in the Williams case, on its facts, goes only so far as to uphold this separate inquiry as to the jurisdictional facts by the court of the second state where the action in the first state was uncontested. On principle and on the basis of an important dictum in the Williams case, it is clear that the same doctrine applies where the jurisdictional facts were fully litigated, provided that in the subsequent action in the second state the state itself or a third person is a party. The opinion of the court on this point (exclusive of citations) reads as follows:

> "It is one thing to re-open an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. But those not parties to a litigation

> ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders. The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact."

In so far as it excludes other states and third persons generally from the effect of the first state's adjudication of the jurisdictional issue, this dictum sets up an important exception to the ordinary principle of res judicata with reference to actions adjudicating status. The principle is set forth in American Law Institute Restatement, Judgments, Section 74 (1) as follows: "In a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status." In comment (a) it says in part: " - - - - the judgment is binding on all persons in the world as to the existence of the status. - - - - - As far as the status is concerned, the judgment is binding not only on persons who were subject to the jurisdiction of the court which rendered the judgment, but also on persons not personally subject

to the jurisdiction of the court." This exception would seem to be confined to a situation where the issue involved is, not the status on the merits, but the jurisdiction of a state to adjudicate a status with extra-territorial effect.

3.

We submit that the reasons for this departure from ordinary principles of res judicata are equally persuasive when we address ourselves to the question as to whether to extend the exception to include the parties themselves. The interest of a state in protecting its own standards of marital status for its own people is as great in a case where its courts are deciding a civil action between the spouses as in a case where its attorney general is prosecuting one of the spouses for bigamous co-habitation. Surely the reason why a judgment as to status is binding on the whole world, while a personal judgment is binding only on the parties and their privies, is that otherwise an intolerable confusion as to the status would result. In adopting a half-way doctrine of res judicata whereby the states and other third persons are not foreclosed by the adjudication of jurisdiction to adjudicate a status, but the parties to the adjudication are, the possibility of confusion as to status is created both as between the states and within each single state. The confusion as to status as between two states is a necessary one arising out of the fact that we have a federal union of forty-eight states each with power over marital status within its own borders and each interested in maintaining its own

particular policy as to status for its own citizens. The confusion as to status within each state however is neither necessary nor desirable and can be eliminated by going the full way on res judicata in this particular situation instead of half-way, i.e. by foreclosing no one, not even the parties themselves. To untether the "whole world" leaves a choice between a rump doctrine of res judicata with utter confusion inside a single state, and no doctrine of res judicata at all in this limited class of cases. It is submitted that the basic policy of giving a state a complete right to investigate the existence of jurisdiction of another state under the full faith and credit clause should prevail.

Nor is confusion the only reason for rejecting the view that the spouses are bound while third persons are not. The predicament in which it leaves each spouse is unfair in the extreme. In every case where they are not the only parties, they may be held to be married. Each may be barred from marrying and cohabiting with anyone else, yet neither can get a divorce at any time for any cause because in any divorce action either might bring against the other the petition would be denied because, being bound by the other state's decree, they must be held to be already divorced. Let us suppose that the court should say in the instant case that Mr. Sherrer cannot prevail because he is barred for having contested jurisdiction in Florida and lost. (It is submitted that this could be the only reason since if it is ruled that there was no contest in Florida, the authority of the second Williams v. North

Carolina would be sufficient.) Not being able to obtain a decree that he is living apart for justifiable cause because he is divorced, he would be equally unable to obtain a divorce because he is divorced. Yet he cannot marry anyone else for the attorney-general of Massachusetts could successfully prosecute him for bigamy. Although Mr. Sherrer would prevail in an action brought by Mrs. Sherrer for support because they are divorced, a creditor of Mrs. Sherrer could recover from him for necessaries furnished her because they are married. She could not claim a dower interest in his property and would not inherit from him in her own right, but a creditor of hers could attach property of which he died seised on the ground that she was his wife and inherited it from him. If she were injured in an automobile accident through the negligence of a tort-feasor, the tort-feasor could defeat the claim for consequential damages of her new husband Mr. Phelps since her true husband was Mr. Sherrer, but Mr. Sherrer might not be able to claim consequential damages either since he might be barred by the contest from claiming to be her husband. It is because of impossible confusions of this nature that there ought never to be a split in the doctrine of res judicata where an issue of status is concerned.

We therefore submit that the case of *Davis v. Davis*, 305 U.S. 32, insofar as it holds that the parties are bound by a contest over jurisdiction in the divorcing state, cannot stand against and has been effectively overruled by the opinion in the second Williams v. North Carolina, to the effect that a state or third person is not so bound.

4.

If it is held that *Davis v. Davis, supra,* has not been or should not be overruled, we submit that on its facts this case does not come within its terms so as to foreclose inquiry into the jurisdictional facts in this subsequent action between the same parties. The decision in the Davis case was made at a time when *Haddock v. Haddock,* 201 U.S. 562 was still the law. In the Haddock case it was held that jurisdiction for divorce rested on either (1) matrimonial domicile, or (2) domicile of one of the parties and personal jurisdiction of the other. It is in the light of this fact that we must read the Davis case to understand fully the court's preoccupation with the question of whether or not the libellee had entered a general appearance in the Virginia court. Since the decision in the first *Williams v. North Carolina,* 317 U.S. 287, the rule has been that domicil of the libellant is sufficient for jurisdiction, without regard to personal jurisdiction of the libellee. Hence the general appearance of Mr. Sherrer in the Florida action had no effect on the jurisdiction of the Florida court. The sole question is whether by his mere answer denying residence and subsequent presence at the court house (R. page 61) he became foreclosed from later questioning the jurisdiction of Florida to grant the decree.

In interpreting the Davis case there seems to be uniformity of opinion as to what it stands for. In a line of Massachusetts cases, including this one, it has been held that it means that an actual contest on the jurisdictional

issue is necessary if the parties are to be bound by the adjudication. *Cohen v. Cohen*, 319 Mass. 31, *Rubinstein v. Rubinstein*, 319 Mass. 568, *Sherrer v. Sherrer*, 1946 Mass. A. S. 1193. In the Cohen case the Massachusetts Court interpreted the Davis case as "resting on the basis that the jurisdictional facts were actually litigated and determined to exist in the court granting the divorce." Connecticut reached a similar conclusion in the case of *Schaeffer v. Schaeffer*, 128 Conn. 628 where it was said: "The decision is placed squarely upon the ground not that the special appearance was enough to give the court the right to pass on the question of jurisdiction but that in consequence of that appearance, having actively contested the issue of jurisdiction, the judgment became one entitled to full faith and credit on that question. It was not the special appearance which brought that about, but the actual contest of the question." In the case of *Giresi v. Giresi*, 137 N.J. Eq. 336, the New Jersey Court took a similar view. The same interpretation is very clearly set out in 163 A.L.R. 375 n. where it is said that the defect of jurisdiction is not cured by appearance or waiver or stipulation as to domicil, nor by anything else short of actual contest and adjudication.

Thus the Davis case represents another departure from the general rules of res judicata, for ordinarily the fact that an issue was raised or, even if not raised, necessarily decided by the judgment entered, would bind the parties as to that issue in a subsequent action between them. This interpretation of the Davis case is confirmed in the

footnote to the dictum in the second Williams v. North Carolina, which dictum was quoted above, as follows: "We have not here a situation where a State disregards the adjudication of another State on an issue of domicil squarely litigated in a truly adversary proceeding."

In the instant case Mr. Sherrer did only the things set forth in the opinion of the Massachusetts Supreme Judicial Court on page 61 of the Record. The finding of both courts that there was no contest over the jurisdictional facts should be sustained.

5.

We recognize that the Massachusetts case of *Bowditch v. Bowditch*, 314 Mass. 410, holding that the burden of sustaining the validity of a foreign decree of divorce is on the party relying on it, was overruled by this court in the second Williams v. North Carolina. It is clear, however, from the record of the testimony that Mr. Sherrer, having made out a prima facie case that he was living apart for justifiable cause, rested before the Florida record was introduced into evidence by Mrs. Sherrer. Direct examination of witnesses by counsel for Mrs. Sherrer begins on page 14 of the Record. Introduction of the Florida decree appears on page 16. When counsel for Mr. Sherrer took Mrs. Sherrer on cross examination, and then continued through Mr. Sherrer's rebuttal witnesses, he was proceeding to attack the validity of the Florida decree by evidence of lack of domicil on the part of Mrs.

Sherrer. We submit that this *is* the respect to which the Florida decree was entitled, and that there is no authority whatever for the proposition that the Florida decree must stand in Massachusetts if there was some evidence in the Massachusetts case by which it might have been found to be valid.

Respectfully submitted,

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Frankfurter J. p. 3.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1947.

Margaret E. Sherrer, Petitioner, v. Edward C. Sherrer.	On Writ of Certiorari to the Probate Court for the County of Berkshire, Commonwealth of Massachusetts.

[June 7, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

We granted certiorari in this case and in *Coe* v. *Coe*, *post*, p.—, to consider the contention of petitioners that Massachusetts has failed to accord full faith and credit to decrees of divorce rendered by courts of sister States.[1]

Petitioner Margaret E. Sherrer and the respondent, Edward C. Sherrer, were married in New Jersey in 1930, and from 1932 until April 3, 1944, lived together in Monterey, Massachusetts. Following a long period of marital discord, petitioner, accompanied by the two children of the marriage, left Massachusetts on the latter date, ostensibly for the purpose of spending a vacation in the State of Florida. Shortly after her arrival in Florida, however, petitioner informed her husband that she did

[1] U. S. Const. Art. IV, § 1, provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Act of May 26, 1790, 1 Stat. 122, as amended, R. S. § 905, 28 U. S. C. § 687, provides in part: ". . . And the said records and judicial proceedings . . . shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

not intend to return to him. Petitioner obtained housing accommodations in Florida, placed her older child in school, and secured employment for herself.

On July 6, 1944, a bill of complaint for divorce was filed at petitioner's direction in the Circuit Court of the Sixth Judicial Circuit of the State of Florida.[2] The bill alleged extreme cruelty as grounds for divorce and also alleged that petitioner was a "bona fide resident of the State of Florida."[3] The respondent received notice by mail of the pendency of the divorce proceedings. He retained Florida counsel who entered a general appearance and filed an answer denying the allegations of petitioner's complaint, including the allegation as to petitioner's Florida residence.[4]

On November 14, 1944, hearings were held in the divorce proceedings. Respondent appeared personally to

[2] By statute, the Circuit Courts, as courts of equity, have jurisdiction of divorce causes. Florida Stat. Ann. § 65.01. *Meloche* v. *Meloche*, 101 Fla. 659, 662, 133 So. 339, 340 (1931).

[3] Section 65.02 of Florida Stat. Ann. provides: "In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint." The Florida courts have construed the statutory requirement of residence to be that of domicile. Respondent does not contend nor do we find any evidence that the requirements of "domicile" as defined by the Florida cases are other than those generally applied or differ from the tests employed by the Massachusetts courts. *Wade* v. *Wade*, 93 Fla. 1004, 113 So. 374 (1927); *Evans* v. *Evans*, 141 Fla. 860, 194 So. 215 (1940); *Fowler* v. *Fowler*, 156 Fla. 316, 22 So. 2d 817 (1945).

[4] The first allegation of respondent's answer stated: "That the Plaintiff is not a bona-fide legal resident of the State of Florida and has not been such continuously for more than the ninety days immediately preceding the filing of the bill of complaint. That on or about April 3, 1944, while the parties were living together as residents of Monterey, Massachusetts, the Plaintiff came to Florida with the children of the parties for a visit and without any expressed intention of establishing a separate residence from the Defendant and has remained in Florida ever since, but without any intention of becoming a bona-fide resident of Florida."

testify with respect to a stipulation entered into by the parties relating to the custody of the children.[5] Throughout the entire proceedings respondent was represented by counsel.[6] Petitioner introduced evidence to establish her Florida residence and testified generally to the allegations of her complaint. Counsel for respondent failed to cross-examine or to introduce evidence in rebuttal.

The Florida court on November 29, 1944, entered a decree of divorce after specifically finding "that petitioner is a bona fide resident of the State of Florida, and that this court has jurisdiction of the parties and the subject matter in said cause; . . ." Respondent failed to challenge the decree by appeal to the Florida Supreme Court.[7]

On December 1, 1944, petitioner was married in Florida to one Henry A. Phelps, whom petitioner had known while both were residing in Massachusetts and who had come to Florida shortly after petitioner's arrival in that State. Phelps and petitioner lived together as husband and wife in Florida, where they were both employed, until February 5, 1945, when they returned to Massachusetts.

In June, 1945, respondent instituted an action in the Probate Court of Berkshire County, Massachusetts, which has given rise to the issues of this case. Respondent alleged that he is the lawful husband of petitioner, that

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[5] The agreement provided that respondent should have custody of the children during the school term of each year and that petitioner should be given custody throughout the rest of the year, subject to the right of both parents to visit at reasonable times. Before the final decree of divorce was entered, respondent returned to Massachusetts accompanied by the two children.

[6] It is said that throughout most of the proceedings respondent did not appear in the courtroom but remained "in a side room."

[7] Appeals lie to the Florida Supreme Court from final decrees of divorce. Fla. Const. Art. V, § 5. And see *e. g.*, *Homan* v. *Homan*, 144 Fla. 371, 198 So. 20 (1940).

the Florida decree of divorce is invalid, and that petitioner's subsequent marriage is void. Respondent prayed that he might be permitted to convey his real estate as if he were sole and that the court declare that he was living apart from his wife for justifiable cause.[8] Petitioner joined issue on respondent's allegations.

In the proceedings which followed, petitioner gave testimony in defense of the validity of the Florida divorce decree.[9] The Probate Court, however, resolved the issues of fact adversely to petitioner's contentions, found that she was never domiciled in Florida, and granted respondent the relief he had requested. The Supreme Judicial Court of Massachusetts affirmed the decree on the grounds that it was supported by the evidence and that the requirements of full faith and credit did not preclude the Massachusetts courts from reexamining the finding of domicile made by the Florida court.[10]

At the outset, it should be observed that the proceedings in the Florida court prior to the entry of the decree of divorce were in no way inconsistent with the requirements of procedural due process. We do not understand respondent to urge the contrary. The respondent person-

[8] The action was brought pursuant to the provisions of Mass. Gen. Laws (Ter. Ed.) c. 209, § 36.

[9] Petitioner testified that for many years prior to her departure for Florida, respondent had made frequent allusions to the fact that petitioner's mother had been committed to a mental institution and had suggested that petitioner was revealing the same traits of mental instability. Petitioner testified that as a result of these remarks and other acts of cruelty, her health had been undermined and that it had therefore become necessary for her to leave respondent. In order to insure her departure, she had represented that her stay in Florida was to be only temporary, but from the outset she had in fact intended not to return. Petitioner testified further that both before and after the Florida decree of divorce had been entered, she had intended to reside permanently in Florida and that she and Phelps had returned to Massachusetts only after receiving a letter stating that Phelps' father was in poor health.

[10] 320 Mass. 351, 69 N. E. 2d 801 (1946).

ally appeared in the Florida proceedings. Through his attorney he filed pleadings denying the substantial allegations of petitioner's complaint. It is not suggested that his rights to introduce evidence and otherwise to conduct his defense were in any degree impaired; nor is it suggested that there was not available to him the right to seek review of the decree by appeal to the Florida Supreme Court. It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25 (1917); *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522 (1931).

It should also be observed that there has been no suggestion that under the law of Florida, the decree of divorce in question is in any respect invalid or could successfully be subjected to the type of attack permitted by the Massachusetts court. The implicit assumption underlying the position taken by respondent and the Massachusetts court is that this case involves a decree of divorce valid and final in the State which rendered it; and we so assume.[11]

[11] See *Williams* v. *North Carolina*, 325 U. S. 226, 233–234 (1945); *cf. Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78, note 26 (1939). No Florida case has been called to our attention involving a collateral attack on a divorce decree questioning the domicile of the parties; and hence the jurisdiction of the court which entered the decree, where both parties appeared in the divorce proceedings. See generally *Everette* v. *Petteway*, 131 Fla. 516, 528–529, 179 So. 666, 671–672 (1938); *State, ex rel. Goodrich Co.* v. *Trammell*, 140 Fla. 500, 505, 192 So. 175, 177 (1939). But *cf. Chisholm* v. *Chisholm*, 98 Fla. 1196, 125 So. 694 (1929); *Dye* v. *Dolbeck*, 114 Fla. 866, 154 So. 847 (1934), involving attacks on jurisdictional findings made in *ex parte* divorce proceedings.

That the jurisdiction of the Florida court to enter a valid decree of divorce was dependent upon petitioner's domicile in that State is not disputed.[12] This requirement was recognized by the Florida court which rendered the divorce decree, and the principle has been given frequent application in decisions of the State Supreme Court.[13] But whether or not petitioner was domiciled in Florida at the time the divorce was granted was a matter to be resolved by judicial determination. Here, unlike the situation presented in *Williams* v. *North Carolina*, 325 U. S. 226 (1945), the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated. The question with which we are confronted, therefore, is whether such a finding made under the circumstances presented by this case may, consistent with the requirements of full faith and credit, be subjected to collateral attack in the courts of a sister State in a suit brought by the defendant in the original proceedings.

The question of what effect is to be given to an adjudication by a court that it possesses requisite jurisdiction in a case, where the judgment of that court is subsequently subjected to collateral attack on jurisdictional grounds, has been given frequent consideration by this Court over a period of many years. Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate.[14]

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[12] *Bell* v. *Bell*, 181 U. S. 175 (1901).

[13] See note 6 *supra*.

[14] *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522 (1931); *Stoll* v. *Gottlieb*, 305 U. S. 165 (1938); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940); *Sunshine*

The reasons for this doctrine have frequently been stated. Thus in *Stoll* v. *Gottlieb*, 305 U. S. 165, 172 (1938), it was said: "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

This Court has also held that the doctrine of *res judicata* must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack.[13]

In *Davis* v. *Davis*, 305 U. S. 32 (1938), the courts of the District of Columbia had refused to give effect to a decree of absolute divorce rendered in Virginia, on the ground that the Virginia court had lacked jurisdiction despite the fact that the defendant had appeared in the Virginia proceedings and had fully litigated the issue of the plaintiff's domicile. This Court held that in failing to give recognition to the Virginia decree, the courts of the District had failed to accord the full faith and credit required by the Constitution. During the course of the opinion, this Court stated: "As to petitioner's don il for divorce and

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Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 (1940); *Jackson* v. *Irving Trust Co.*, 311 U. S. 494 (1941). And see *Forsyth* v. *Hammond*, 166 U. S. 506 (1897); *Heiser* v. *Woodruff*, 327 U. S. 726 (1946).

[13] *American Surety Co.* v. *Baldwin*, 287 U. S. 156 (1932); *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939). And see *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25 (1917).

his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation." [16]

We believe that the decision of this Court in the *Davis* case and those in related situations [17] are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.[18]

Applying these principles to this case, we hold that the Massachusetts courts erred in permitting the Florida divorce decree to be subjected to attack on the ground that petitioner was not domiciled in Florida at the time the decree was entered. Respondent participated in the Florida proceedings by entering a general appearance,

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[16] *Davis* v. *Davis*, 305 U. S. 32, 40 (1938). And see *Stoll* v. *Gottlieb*, 305 U. S. 165, 172, note 13 (1938).

[17] See cases discussed *supra*.

[18] We, of course, intimate no opinion as to the scope of Congressional power to legislate under Article IV, § 1 of the Constitution. See note 1 *supra*.

filing pleadings placing in issue the very matters he sought subsequently to contest in the Massachusetts courts, personally appearing before the Florida court and giving testimony in the case, and by retaining attorneys who represented him throughout the entire proceedings. It has not been contended that respondent was given less than a full opportunity to contest the issue of petitioner's domicile or any other issue relevant to the litigation. There is nothing to indicate that the Florida court would not have evaluated fairly and in good faith all relevant evidence submitted to it. Respondent does not even contend that on the basis of the evidence introduced in the Florida proceedings, that court reached an erroneous result on the issue of petitioner's domicile. If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered.

It is suggested, however, that *Andrews* v. *Andrews*, 188 U. S. 14 (1903), militates against the result we have reached. In that case a husband, who had been domiciled in Massachusetts, instituted divorce proceedings in a South Dakota court after having satisfied the residence requirements of that State. The wife appeared by counsel and filed pleadings challenging the husband's South Dakota domicile. Before the decree of divorce was granted, however, the wife, pursuant to a consent agreement between the parties, withdrew her appearance from the proceedings. Following the entry of the decree, the husband returned to Massachusetts and subsequently remarried. After his death a contest developed between his first and second wives as to the administration of

the husband's estate. The Massachusetts court concluded that the South Dakota decree of divorce was void on the ground that the husband had not been domiciled in that State and that under the applicable statutes of Massachusetts, the Massachusetts courts were not required to give recognition to such a decree. This Court affirmed on writ of error by a divided vote.[19]

On its facts, the *Andrews* case presents variations from the present situation.[20] But insofar as the rule of that case may be said to be inconsistent with judgment herein announced, it must be regarded as having been superseded by subsequent decisions of this Court. The *Andrews* case was decided prior to the considerable modern development of the law with respect to finality of jurisdictional findings.[21] One of the decisions upon which the majority of the Court in that case placed primary reliance, *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265 (1888), was, insofar as pertinent, overruled in *Milwaukee County* v. *White Co.*, 296 U. S. 268 (1935). The *Andrews* case, therefore, may not be regarded as determinative of the issues before us.

It is urged further, however, that because we are dealing with litigation involving the dissolution of the marital relation, a different result is demanded from that which might properly be reached if this case were concerned with other types of litigation. It is pointed out that under the Constitution, the regulation and control of marital and family relationships are reserved to the States. It is urged, and properly so, that the regulation of the incidents of the marital relation involves the exercise by

[19] Justices Brewer, Shiras, and Peckham dissented. Mr. Justice Holmes took no part in the case.

[20] Thus, in the *Andrews* case, before the divorce decree was entered by the South Dakota court, the defendant withdrew her appearance in accordance with a consent agreement.

[21] See note 14 *supra*.

the States of powers of the most vital importance. Finally, it is contended that a recognition of the importance to the States of such powers demands that the requirements of full faith and credit be viewed in such a light as to permit an attack upon a divorce decree granted by a court of a sister State under the circumstances of this case even where the attack is initiated in a suit brought by the defendant in the original proceedings.[22]

But the recognition of the importance of a State's power to determine the incidents of basic social relationships into which its domiciliaries enter does not resolve the issues of this case. This is not a situation in which a State has merely sought to exert such power over a domiciliary. This is, rather, a case involving inconsistent assertions of power by courts of two States of the Federal Union and thus presents considerations which go beyond the interests of local policy, however vital. In resolving the issues here presented, we do not conceive it to be a part of our function to weigh the relative merits of the policies of Florida and Massachusetts with respect to divorce and related matters. Nor do we understand the decisions of this Court to support the proposition that the obligation imposed by Article IV, § 1 of the Constitution and the Act of Congress passed thereunder, amounts to something less than the duty to accord *full* faith and credit to decrees of divorce entered by courts of sister States.[23] The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.[24] If in its application local policy

[22] But *cf. Williams* v. *North Carolina*, 325 U. S. 226, 230 (1945).

[23] *Davis* v. *Davis*, 305 U. S. 32, 40 (1938); *Williams* v. *North Carolina*, 317 U. S. 287, 294 (1942).

[24] *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276–277 (1935); *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 439 (1943).

must at times be required to give way, such "is part of the price of our federal system." *Williams* v. *North Carolina*, 317 U. S. 287, 302 (1942).[25]

This is not to say that in no case may an area be recognized in which reasonable accommodations of interest may properly be made. But as this Court has heretofore made clear, that area is of limited extent.[26] We believe that in permitting an attack on the Florida divorce decree which again put in issue petitioner's Florida domicile and in refusing to recognize the validity of that decree, the Massachusetts courts have asserted a power which cannot be reconciled with the requirements of due faith and credit. We believe that assurances that such a power will be exercised sparingly and wisely render it no less repugnant to the constitutional commands.

It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in *ex parte* proceedings.[27] It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent

[25] But we may well doubt that the judgment which we herein announce will amount to substantial interference with state policy with respect to divorce. Many States which have had occasion to consider the matter have already recognized the impropriety of permitting a collateral attack on an out-of-state divorce decree where the defendant appeared and participated in the divorce proceedings. See, *e. g.*, *Norris* v. *Norris*, 200 Minn. 246, 273 N. W. 708 (1937); *Miller* v. *Miller*, 65 N. Y. S. 2d 696 (1946), affirmed 271 App. Div. 974, 67 N. Y. S. 2d 379 (1947); *Cole* v. *Cole*, 96 N. J. Eq. 206, 124 A. 359 (1924).

[26] *Broderick* v. *Rosner*, 294 U. S. 629, 642 (1935); *Williams* v. *North Carolina*, 317 U. S. 287, 294–295 (1942).

[27] *Williams* v. *North Carolina*, 325 U. S. 226 (1945).

with the highest requirements of due process and in which the defendant has participated. We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gantlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected. That vital interests are involved in divorce litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end such litigation.[25] And where a decree of divorce is rendered by a competent court under the circumstances of this case, the obligation of full faith and credit requires that such litigation should end in the courts of the State in which the judgment was rendered.

Reversed.

[25] Cf. *Stoll* v. *Gottlieb*, 305 U. S. 165, 172 (1938).

SUPREME COURT OF THE UNITED STATES

No. 37.—October Term, 1947.

Martin V. B. Coe, Petitioner, v. Katherine C. Coe.	On Writ of Certiorari to the Probate Court for the County of Worcester, Commonwealth of Massachusetts.

[June 7, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

This is the companion case to *Sherrer* v. *Sherrer, ante,* p. —. We granted certiorari to consider the contention of petitioner that the courts of Massachusetts have failed to accord full faith and credit to a decree of divorce rendered by a court of the State of Nevada.

Petitioner, Martin V. B. Coe, and the respondent, Katherine C. Coe, were married in New York in 1934, and thereafter resided as husband and wife in Worcester, Massachusetts.[1] Discord developed between the parties, and on January 13, 1942, respondent filed a petition for separate support in the Probate Court for the County of Worcester. Petitioner answered and filed a libel for divorce. Following a hearing, the petition for separate support was granted and the libel for divorce was dismissed.[2] The decree of the Probate Court was affirmed by the Supreme Judicial Court of Massachusetts on February 23, 1943.[3]

Petitioner left Worcester in May, 1942, and arrived in Reno, Nevada, on June 10, accompanied by his secre-

[1] It appears that after October, 1940, petitioner maintained an apartment in New York City. The Massachusetts courts found that petitioner did not thereby lose his Massachusetts domicile.

[2] By the terms of the decree of separate support entered on March 25, 1942, petitioner was ordered to pay to respondent the sum of $35 each week.

[3] 313 Mass. 232, 46 N. E. 2d 1017 (1943).

tary, one Dawn Allen, and her mother. On July 24, 1942, petitioner, through his attorney, instituted divorce proceedings by filing a complaint in the First Judicial District Court of the State of Nevada. The complaint alleged that petitioner was a bona fide resident of the State of Nevada [4] and charged respondent with desertion and extreme cruelty. Respondent received notice of the proceedings while in Massachusetts. She arrived in Nevada in August, 1942, and thereafter, through attorneys, filed an answer to petitioner's complaint together with a cross-complaint for divorce alleging extreme cruelty on the part of petitioner as grounds for her suit. Respondent's answer admitted as true the allegations of petitioner's complaint relating to petitioner's Nevada residence.

At the hearing in the divorce proceedings, petitioner and respondent appeared personally. Both parties were represented by counsel. Petitioner testified that he had come to Nevada with the intention of making that State his home and that such was his present intention. Respondent gave testimony with respect to specific acts of cruelty, but raised no question in relation to petitioner's domicile. On September 19, 1942, the Nevada court, after finding that it had "jurisdiction of the plaintiff and defendant and of the subject matter involved," [5]

[4] The first allegation of petitioner's complaint stated: "That plaintiff for more than six weeks last past and immediately preceding the filing of this complaint has been continuously and now is, a bona fide resident of, and during all of said period of time, has had and now has his residence within the State of Nevada, and has been physically, corporally and actually present in said State during all of the aforesaid period of time."

[5] The Navada courts recognize domicile of one of the parties as a prerequisite to divorce jurisdiction, *Latterner* v. *Latterner*, 51 Nev. 285, 274 P. 194 (1929). Power to decree divorces in appropriate cases is conferred upon the District Courts by Nevada statute. Nev. Comp. Laws, § 9460.

entered a decree granting respondent a divorce as prayed for in her cross-complaint.[6] Neither party challenged the decree by appeal to the Nevada Supreme Court.[7]

Following the entry of the divorce decree, petitioner and Dawn Allen were married in Nevada. Shortly thereafter, they returned to Worcester, Massachusetts, as husband and wife. In May or June, 1943, they left Massachusetts for Nevada where they remained until August of that year.

On May 22, 1943, respondent filed a petition in the Probate Court for the County of Worcester, praying that petitioner be adjudged in contempt of court for failing to abide by the terms of the decree for separate support which had been entered by the Massachusetts court in the previous year.[8] Subsequently, respondent also moved that the decree for separate support be modified so as to award her a larger allowance. Petitioner in his answer denied that the decree for separate support was still in effect and set up the Nevada divorce decree as a bar to respondent's action.

In the hearings which followed, petitioner introduced in evidence an exemplified copy of the Nevada court proceeding. The presiding judge refused to allow the introduction of evidence placing in issue petitioner's Nevada domicile and thereby the jurisdiction of the Nevada court, on the ground that permitting such collateral

[6] Incorporated into the decree was a written agreement whereby petitioner was to pay respondent the sum of $7,500 plus $35 per week so long as she should remain single. Pursuant to this agreement, petitioner paid the sum of $7,500 at the time the decree was entered.

[7] Appeals lie to the Nevada Supreme Court in divorce cases. See, *e. g., Afriat v. Afriat*, 61 Nev. 321, 117 P. 2d 83 (1941).

[8] Apparently upon advice of counsel, petitioner had failed to pay any of the weekly installments required under the decree for separate support or under the agreement incorporated into the divorce decree after the date of the divorce decree.

attack was not consistent with the requirements of full faith and credit. Petitioner's motion to dismiss the action was, accordingly, allowed.

The Supreme Judicial Court of Massachusetts reversed on appeal holding that the Probate Court had erred in excluding the evidence placing in issue petitioner's Nevada domicile and the jurisdiction of the Nevada court.[9] In conformity with that judgment, the Probate Court held an extended hearing on those questions.[10] The court concluded that petitioner went to Nevada to seek a divorce; that neither petitioner nor respondent had a bona fide residence in that State; that the Nevada court did not have jurisdiction of either party; and that the divorce was in violation of the provisions of the applicable Massachusetts statute.[11] The Probate Court dismissed petitioner's motion for revocation of the decree

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[9] 316 Mass. 423, 55 N. E. 2d 702 (1944).

[10] Petitioner testified that since his arrival in Nevada in June, 1942, he had been domiciled in that State. He stated that he went to Nevada to help his asthma and to take advantage of the liberal tax laws and that he intended to reside in Nevada whether or not he obtained a divorce. He testified further that following his marriage with Dawn Allen, he went to Worcester, Massachusetts, for the purpose of disposing of two houses which he owned. He subsequently returned to Nevada in May, 1943. Petitioner stated that shortly after his return to Nevada, he learned that respondent had instituted contempt proceedings in the Massachusetts Probate Court and upon advice of counsel went to Massachusetts in August, 1943, to defend the action.

[11] Mass. Gen. Laws (Ter. ed.) c. 208, § 39, provides: "A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth."

for separate support and modified that decree so as to award respondent a substantially larger allowance. On appeal, the Supreme Judicial Court affirmed the order of the Probate Court dismissing petitioner's motion to revoke the decree for separate support, on the ground that the evidence supported the conclusion that petitioner was never domiciled in Nevada and that the Nevada courts lacked jurisdiction to enter the decree of divorce. The order of the Probate Court modifying the decree for separate support was reversed, apparently for further hearings on petitioner's financial condition.[12] There is no suggestion in the opinion of the Supreme Judicial Court that petitioner, under state law, could be held to the obligations imposed by the decree for separate support if it be conceded that the Nevada decree of divorce is valid.[13]

It is clear that the decree of divorce in question is valid and final in the State in which it was rendered and, under the law of Nevada, may not be subjected to the collateral attack permitted in this case in the Massachusetts courts.[14] Respondent does not urge the contrary.

Nor has it been suggested that the proceedings before the Nevada court were in any degree violative of the requirements of procedural due process or that respondent was denied a full opportunity to contest the issue of petitioner's Nevada domicile.

It is abundantly clear that respondent participated in the Nevada divorce proceedings. She appeared personally and gave testimony at the hearing. Through her

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[12] 320 Mass. 295, 69 N. E. 2d 793 (1946).

[13] See *Rosa* v. *Rosa*, 296 Mass. 271, 5 N. E. 2d 417 (1936); *Cohen* v. *Cohen*, 319 Mass. 31, 64 N. E. 2d 689 (1946). Cf. *Estin* v. *Estin*, No. 139, 1947 Term; *Kreiger* v. *Kreiger*, No. 371, 1947 Term.

[14] *Confer* v. *District Court*, 49 Nev. 18, 234 P. 688 (1925). And see *Chamblin* v. *Chamblin*, 55 Nev. 146, 27 P. 2d 1061 (1934); *Calvert* v. *Calvert*, 61 Nev. 168, 122 P. 2d 426 (1942).

attorneys she filed pleadings in answer to petitioner's complaint and successfully invoked the jurisdiction of the Nevada court to obtain the decree of divorce which she subsequently subjected to attack as invalid in the Massachusetts courts.

Thus, here, as in the *Sherrer* case, the decree of divorce is one which was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunity to contest the jurisdictional issues. It is a decree not susceptible to collateral attack in the courts of the State in which it was rendered. In the *Sherrer* case, we concluded that the requirements of full faith and credit preclude the courts of a sister State from subjecting such a decree to collateral attack by readjudicating the existence of jurisdictional facts. That principle is no less applicable where, as here, the party initiating the collateral attack is the party in whose favor the decree was entered. For reasons stated at length in the *Sherrer* case, we hold that the Massachusetts courts erred in permitting the Nevada divorce decree to be subjected to attack on the ground that petitioner was not domiciled in Nevada at the time the decree was entered.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1947.

Margaret E. Sherrer, Petitioner, *v.* Edward C. Sherrer.	On Writ of Certiorari to the Probate Court for the County of Berkshire, Commonwealth of Massachusetts.

No. 37.—October Term, 1947.

Martin V. B. Coe, Petitioner, *v.* Katherine C. Coe.	On Writ of Certiorari to the Probate Court for the County of Worcester, Commonwealth of Massachusetts.

[June 7, 1948.]

Mr. Justice Frankfurter, with whom Mr. Justice Murphy concurs, dissenting.

What Mr. Justice Holmes said of the ill-starred *Haddock* v. *Haddock* may equally be said here: "I do not suppose that civilization will come to an end whichever way this case is decided." 201 U. S. 562, 628. But, believing as I do that the decision just announced is calculated, however unwittingly, to promote perjury without otherwise appreciably affecting the existing disharmonies among the forty-eight States in relation to divorce, I deem it appropriate to state my views.

Not only is today's decision fraught with the likelihood of untoward consequences. It disregards a law that for a century has expressed the social policy of Massachusetts, and latterly of other States, in a domain which under our Constitution is peculiarly the concern of the States and not of the Nation.

If all that were necessary in order to decide the validity in one State of a divorce granted in another was to read the Full Faith and Credit Clause of the Constitution, generations of judges would not have found the problem so troublesome as they have, nor would a divided Court have successively pronounced a series of discordant decisions. "Full faith and credit" must be given to a judgment of a sister State. But a "judgment" implies the power of the State to deal with the subject-matter in controversy. A State court which has entered what professes to be a judgment must have had something on which to act. That something is what is conveyed by the word "jurisdiction," and, when it comes to dissolving a marriage status, throughout the English-speaking world the basis of power to act is domicile. Whether or not in a particular situation a person is domiciled in a given State depends on circumstances, and circumstances have myriad diversities. But there is a consensus of opinion among English-speaking courts the world over that domicile requires some sense of permanence of connection between the individual who claims it and the State which he asks to recognize it.

It would certainly have been easier if from the beginning the Full Faith and Credit Clause had been construed to mean that the assumption of jurisdiction by the courts of a State would be conclusive, so that every other State would have to respect it. But such certainly has not been the law since 1873. *Thompson* v. *Whitman*, 18 Wall. 457. Nor was it the law when this Court last considered the divorce problem, in 1945. *Williams* v. *North Carolina*, 325 U. S. 226. A State that is asked to enforce the action of another State may appropriately ascertain whether that other State had power to do what it purported to do. And if the enforcing State has an interest under our Constitution in regard to the subject-matter that is vital and intimate, it should not be within the power of private parties to foreclose that in-

terest by their private arrangement. *Andrews* v. *Andrews*, 188 U. S. 14; cf. *Fall* v. *Eastin*, 215 U. S. 1; *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U. S. 532.

If the marriage contract were no different from a contract to sell an automobile, the parties thereto might well be permitted to bargain away all interests involved, in or out of court. But the State has an interest in the family relations of its citizens vastly different from the interest it has in an ordinary commercial transaction. That interest cannot be bartered or bargained away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a State to which the parties are strangers. Therefore, the constitutional power of a State to determine whether or not the marriage status of two of its citizens should not be deemed foreclosed by a proceeding between the parties in another State, even though in other types of controversy considerations making it desirable to put an end to litigation might foreclose the parties themselves from reopening the dispute.[1] I cannot agree that the Constitution forbids a State from insisting that it is not bound by any such proceedings in a distant State wanting in the power that domicile alone gives, and that its courts need not honor such an intrinsically sham proceeding, no matter who brings the issue to their attention.

[1] Nor do I regard *Davis* v. *Davis*, 305 U. S. 32, as contrary authority. That case did not depend for its result on the fact that there had been an adjudication of the jurisdiction of the court rendering the divorce enforced, inasmuch as this Court found that the State granting the divorce was in fact that of the domicile. 305 U. S. at 41. Moreover this Court's citation therein of *Andrews* v. *Andrews*, *supra*, indicates an absence of intention to overrule the holding of that case that opportunity to litigate the issue of domicile does not foreclose inquiry as to the true facts. *Andrews* v. *Andrews* has since been cited with respect, as recently as *Williams* v. *North Carolina*, 317 U. S. 287, 309, 320, n. 7, and 325 U. S. 226, 229, 240, 242.

That society has a vital interest in the domestic relations of its members will be almost impatiently conceded.[2] But it is not enough to pay lip-service to the commonplace as an abstraction. Its implications must be respected. They define our problems. Nowhere in the United States, not even in the States which grant divorces most freely, may a husband and wife rescind their marriage at will as they might a commercial contract. Even if one thought that such a view of the institution of marriage was socially desirable, it could scarcely be held that such a personal view was incorporated into the Constitution or into the law for the enforcement of the Full Faith and Credit Clause, enacted by the First Congress. 1 Stat. 122, 28 U. S. C. § 687. That when the Constitution was ordained divorce was a matter of the deepest public concern, rather than deemed a personal dispute between private parties, is shown by the fact that it could be secured almost exclusively only by special enactments of the several legislatures and not through litigation in court. See Ireland and Galindez, Divorce in the Americas (1947) p. 1.

As a contract, the marriage contract is unique in the law. To assimilate it to an ordinary private contract can only mislead. See *Maynard* v. *Hill*, 125 U. S. 190, 210–14; Restatement of the Law, Contracts, §§ 584, 586; cf. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 627–29. The parties to a marriage do not comprehend between them all the interests that the relation contains. Society sanctions the institution and creates and enforces its bene-

[2] Compare the English laws providing for a King's Proctor to represent the interests of the Crown in divorce proceedings. Sections 5–7, Matrimonial Causes Act, 1860, 23 & 24 Vict., c. 44; § 1, Matrimonial Causes Act, 1873, 36 & 37 Vict., c. 31; § 181, The Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49, 9 Halsbury's Statutes of England 393–94.

fits and duties. As a matter of law, society is represented by the permanent home State of the parties, in other words, that of their domicile. In these cases that State was Massachusetts.

Massachusetts has seen fit to subject its citizens to the following law:

> "A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth." Mass. Gen. Laws c. 208, § 39 (1932).

This statute, in substance,[3] was first enacted in 1835, and even then merely formalized a prior rule of judicial origin. Cf. *Hanover* v. *Turner*, 14 Mass. 227; Report of the Commissioners Appointed to Revise the General Statutes of the Commonwealth, pt. II, p. 123; 2 Kent, Commentaries, Lect. 27, *108–*109. The Uniform Annulment of Marriages and Divorce Act,[4] passed by Dela-

[3] Rev. L. 1835, c. 76:

"§ 39. When any inhabitant of this state shall go into any other state or country, in order to obtain a divorce for any cause which had occurred here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state.

"§ 40. In all other cases, a divorce decreed in any other state or country, according to the law of the place, by a court having jurisdiction of the cause and of both of the parties, shall be valid and effectual in this state."

[4] See note 13, *infra*.

ware,[5] New Jersey,[6] and Wisconsin,[7] is almost identical, as is a Maine statute[8] on the same subject.

Massachusetts says through this statute that a person who enjoys its other institutions but is irked by its laws concerning the severance of the marriage tie, must either move his home to some other State with more congenial laws, or remain and abide by the laws of Massachusetts. He cannot play ducks and drakes with the State, by leaving it just long enough to take advantage of a proceeding elsewhere, devised in the interests of a quick divorce, intending all the time to retain Massachusetts as his home, and then return there, resume taking advantage of such of its institutions as he finds congenial but assert his freedom from the restraints of its policies concerning severance of the marriage tie. Massachusetts has a right to define the terms on which it will grant divorces, and to refuse to recognize divorces granted by other States to parties who at the time are still Massachusetts domiciliaries. Has it not also the right to frustrate evasion of its policies by those of its permanent residents who leave the State to change their spouses rather than to change their homes, merely because they go through a lukewarm or feigned contest over jurisdiction?

The nub of the *Williams* decision was that the State of domicile has an independent interest in the marital status of its citizens that neither they nor any other State with which they may have a transitory connection may abrogate against its will. Its interest is not less because both parties to the marital relationship instead of one sought to evade its laws. In the *Williams* case, it was not the interest of Mrs. Williams, or that of Mr. Hendryx,

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[5] Del. Rev. Code c. 86, § 29 (1935).
[6] N. J. Stat. Ann. § 2:50:35 (1939).
[7] Wis. Stat. § 247.21 (1945).
[8] Me. Rev. Stat. c. 73, § 12 (1930).

that North Carolina asserted. It was the interest of the people of North Carolina. The same is true here of the interest of Massachusetts.[9] While the State's interest may be expressed in criminal prosecutions, with itself formally a party, as in the *Williams* case, the State also expresses its sovereign power when it speaks through its courts in a civil litigation between private parties. Cf. *Shelley* v. *Kraemer*, 334 U. S. 1.

Surely there is involved here an exercise by Massachusetts of its policy concerning the termination of marriage by its own citizens. The Framers left that power over domestic relations in the several States, and every effort to withdraw it from the States within the past sixty years has failed.[10] An American citizen may change his domicile from one State to another. And so, a State must respect another State's valid divorce decree even though it concerns its former citizens. But the real question here is whether the Full Faith and Credit Clause can be used as a limitation on the power of a State over its citizens who do not change their domicile, who do not remove to another State, but who leave the State only long enough to escape the rigors of its laws, obtain a divorce, and then scurry back. To hold that this Massachusetts statute contravenes the Full Faith and Credit Clause is to say that that State has so slight a concern in the continuance or termination of the marital relationships of its domiciliaries that its interest may be foreclosed by an arranged

[9] The result of the assertion of the State's interest may be a windfall to a party who has sought to bargain his or her rights away and now seeks to renege on the agreement. This fact, however, should scarcely be allowed to stand in the way of the assertion by the State of its paramount concern in the matter. Such an unexpected windfall to a party, who by ethical standards may be regarded as undeserving, is a frequent consequence of findings of lack of jurisdiction. See Holmes, C. J., in *Andrews* v. *Andrews*, 176 Mass. 92, 96.

[10] See note 13, *infra*.

litigation between the parties in which it was not represented.[11]

Today's decision may stir hope of contributing toward greater certainty of status of those divorced. But when people choose to avail themselves of laws laxer than those of the State in which they permanently abide, and where, barring only the interlude necessary to get a divorce, they choose to continue to abide, doubts and conflicts are inevitable, so long as the divorce laws of the forty-eight States remain diverse, and so long as we respect the law that a judgment without jurisdictional foundation is not constitutionally entitled to recognition everywhere. These are difficulties, as this Court has often reminded, inherent in our federal system, in which governmental power over domestic relations is not given to the central government. Uniformity regarding divorce is not within the power of this Court to achieve so long as "the domestic relations of husband and wife . . . were matters reserved to the States." *Ohio ex rel. Popovici* v. *Agler*, 280 U. S. 379, 384; *In re Burrus*, 136 U. S. 586, 593–94.[12] And so

[11] Today's decision would also seem to render invalid, under the Full Faith and Credit Clause, a large proportion of the commonly encountered injunctions against a domiciliary prosecuting an out-of-State divorce action. Cf. *Kempson* v. *Kempson*, 58 N. J. Eq. 94, 61 N. J. Eq. 303, 63 N. J. Eq. 783; Pound, *The Progress of the Law—Equity*, 33 Harv. L. Rev. 420, 425–28; Jacobs, *The Utility of Injunctions and Declaratory Judgments in Migratory Divorce*, 2 Law & Contemp. Prob. 370; Note, 13 Bklyn. L. Rev. 148. Since no State may enjoin its inhabitants from changing their domiciles in order to procure divorces, it would seem that henceforth a recital of domicile in the out-of-State divorce decree will render the injunction retroactively invalid if there has been any semblance of a contest in the divorce proceeding.

[12] The Massachusetts law is surely legislation within the field regulating the domestic relations of husband and wife, and, as such, within the scope of "matters reserved to the States." It can scarcely be doubted that if a constitutional amendment withdrew this field

long as the Congress has not exercised its powers under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees, this Court cannot through its adjudications achieve the result sought to be accomplished by a long train of abortive efforts at legislative and constitutional reform.[13] To attempt to shape

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from the States and gave it to the Federal Government, an Act of Congress, making the same provision substantively as did Massachusetts, regarding divorces granted in countries other than the United States to citizens of this country, would be held constitutional. Such a law is not less a law concerning "the domestic relations of husband and wife," even though incidentally it may affect the force to be given to what appears to be a judgment of a sister State.

[13] Three modes of achieving uniformity have been attempted—adoption of a constitutional amendment authorizing Federal domestic relations legislation; Congressional action simplementing the Full Faith and Credit Clause; and uniform State legislation. Such attempts were originally fostered by those who sought legislation rendering divorce uniformly *difficult* to obtain. See Lichtenberger, Divorce (1931) pp. 187 *et seq.*; Cavers, Foreword, 2 Law & Contemp. Prob. 289.

The first effort to amend the Constitution to empower Congress to enact domestic relations legislation uniform throughout the Nation was made in 1884. Since then at least seventy similar amendments have been proposed. Ames, The Proposed Amendments to the Constitution of the United States during the First Century of its History, [1896] Ann. Rep. American Historical Ass'n, reprinted as H. R. Doc. No. 353, 54th Cong., 2d Sess., pt. 2, p. 190; Sen. Doc. No. 93, 69th Cong., 1st Sess.; "Proposed Amendments to the Constitution of the United States Introduced in Congress from the 69th Congress, 2d Session through the 78th Congress, December 6, 1926, to December 19, 1944" (U. S. Govt. Printing Office, 1946). None has been favorably acted upon. See, *e. g.*, H. R. Rep. No. 1290, 52nd Cong., 1st Sess., p. 2, in which the majority of the House Judiciary Committee, reporting adversely on such a proposed amendment, pointed out that Congress might achieve a measure of uniformity through exercise of its existing powers to implement the Full Faith and Credit Clause.

Suggestions that such a statute be enacted by Congress, have not

policy so as to avoid disharmonies in our divorce laws was not a power entrusted to us, nor is the judiciary

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been lacking. See, *e. g.*, 52 Rep. A. B. A. 292, 319; Corwin, *The "Full Faith and Credit" Clause*, 81 U. of Pa. L. Rev. 371, 388; cf. Mr. Justice Stone, dissenting, in *Yarborough* v. *Yarborough*, 290 U. S. 202, 215, n. 2; Jackson, *Full Faith and Credit—The Lawyers' Clause of the Constitution*, 45 Col. L. Rev. 1, 21. And Senator McCarron of Nevada is currently seeking to have such legislation adopted. See S. 1960, 80th Cong., 2d Sess.

The most vigorous efforts, however, have been made in the direction of securing uniform State legislation. President Theodore Roosevelt, in calling on Congress to provide for compilation of marriage and divorce statistics, included a suggestion of cooperation among the States in enacting uniform laws. 15 Richardson, Messages and Papers of the Presidents 6942. On the initiative of the Governor of Pennsylvania, a National Congress on Uniform Divorce Laws, in which forty-two States were represented, was called in 1906. This Congress resolved that a constitutional amendment was not feasible and drafted resolutions concerning uniform State legislation. Lichtenberger, *supra*, 191–96. See also Proceedings, National Congress on Uniform Divorce Laws (1906) *passim*; Proceedings 2d Meeting of the Governors of the States of the Union (1910) pp. 185–98. It is interesting to note that even these proponents of uniformity advocated that each State "adopt a statute embodying the principle contained in" the very Massachusetts statute now held unconstitutional by the Court perhaps in the interests of uniformity. Lichtenberger, *supra*, at 194.

The bill prepared by the Congress was also approved by the Commissioners on Uniform State Laws (Proceedings, 17th Ann. Conf., Commissioners on Uniform State Laws (1907) pp. 120 *et seq.*) but was adopted by only three States. See pp. 5–6, *supra*. The Commissioners eventually decided that no uniform law establishing substantive grounds for divorce could succeed, and replaced this proposal with the Uniform Divorce Jurisdiction Act, which would have accorded recognition to a wider range of decrees than were protected by *Haddock* v. *Haddock*, 201 U. S. 562, then in force. [1930] Handbook of the National Conference of Commissioners on Uniform State Laws, pp. 498–502. This act has been adopted only by Vermont, L. 1931, No. 45, and was repealed two years later. L. 1933, No. 38.

Meanwhile, other organizations have not given up the attempt to have enacted uniform divorce laws, although in recent years the ob-

competent to exercise it. Courts are not equipped to pursue the paths for discovering wise policy. A court is confined within the bounds of a particular record, and it cannot even shape the record. Only fragments of a social problem are seen through the narrow windows of a litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution. The answer to so tangled a problem as that of our conflicting divorce laws is not to be achieved by the simple judicial resources of either/or—this decree is good and must be respected, that one is bad and may be disregarded. We cannot draw on the available power for social invention afforded by the Constitution for dealing adequately with the problem, because the power belongs to the Congress and not to the Court. The only way in which this Court can achieve uniformity, in the absence of Congressional action or constitutional amendment, is by permitting the States with the laxest divorce laws to impose their policies upon all other States. We cannot as judges be ignorant of that which is common knowledge to all men. We cannot close our eyes to the fact that certain States make an industry of their easy divorce laws, and encourage inhabitants of other States to obtain "quickie" divorces which their home States deny them.[14] To permit such States to bind all others to their decrees would endow with

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jective has usually been uniformly liberal rather than uniformly repressive legislation. See, *e. g.*, Woman's Home Companion, Dec., 1947, p. 32.

Even in the international field, attempts to avoid conflicts as to the extraterritorial validity of divorces have been made. See, *e. g.*, Convention to Regulate Conflicts of Laws and of Jurisdiction in Matters of Divorce and Separation, The Hague, June 12, 1902.

[14] See the interesting account of Nevada's divorce mill, written by two members of the Nevada Bar, Ingram and Ballard, *The Business of Migratory Divorce in Nevada*, 2 Law & Contemp. Prob. 302; cf. Bergeson, *The Divorce Mill Advertises*, id, at 348.

constitutional sanctity a Gresham's Law of domestic relations.

Fortunately, today's decision does not go that far. But its practical result will be to offer new inducements for conduct by parties and counsel, which, in any other type of litigation, would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it. But if the doctrine of *res judicata* as to jurisdictional facts in controversies involving exclusively private interests as infused into the Full Faith and Credit Clause is applied to divorce decrees so as to foreclose subsequent inquiry into jurisdiction, there is neither logic nor reason nor practical desirability in not taking the entire doctrine over. *Res judicata* forecloses relitigation if there has been an opportunity to litigate once, whether or not it has been availed of, or carried as far as possible. *Cromwell* v. *County of Sac*, 94 U. S. 351; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371.[15] And it applies to questions of jurisdiction of subject matter as well as to that of persons. *Stoll* v. *Gottlieb*, 305 U. S. 165; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66. Why should it not apply where there has been a wasted opportunity to litigate, but should apply where the form of a contest has been gone through?[16] Or if more than form is required, how much

[15] *Quaere*, whether today's decision applies to *ex parte* Nevada decrees by default, where the defendant later files a general appearance and the record is made to show jurisdiction *nunc pro tunc*. Nev. Comp. Laws § 9488.

[16] It is by no means clear that the issue before the Massachusetts courts in either of these cases was or could have been litigated in Florida or Nevada. All that the Florida or Nevada courts could have determined was whether the jurisdictional requisites of State law and of the due process clause of the Constitution were met. And if a direct attack on these decrees had been made in this Court, all that we could have decided would have been the due process point. A divorce may satisfy due process requirements, and be valid where

of a contest must it be? Must the contest be bellicose or may it be pacific? Must it be fierce or may it be tepid? Must there be a cloud of witnesses to negative the testimony of the plaintiff, or may a single doubter be enough? Certainly if the considerations that establish *res judicata* as between private litigants in the ordinary situations apply to the validity of a divorce against the public policy of the State of domicile, it cannot make a rational difference that the question of domicile is contested with bad feeling rather than amicably adjusted. The essence of the matter is that through the device of a consent decree a policy of vital concern to States should not be allowed to be defied with the sanction of this Court. If perchance the Court leaves open the right of a State to prove fraud in the ordinary sense—namely, that a mock contest was won by prearrangement—the claim falls that today's decision will substantially restrict the area of uncertainty as to the validity of divorces. If the Court seeks to avoid this result by holding that a party to a feigned legal contest cannot question in his home State the good faith behind an adjudication of domicile in another State, such holding is bound to encourage fraud and collusion still further.

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rendered, and still lack the jurisdictional requisites for full faith and credit to be mandatory. Compare *Williams* v. *North Carolina*, 317 U. S. 287, 307 (concurring opinion), with *Williams* v. *North Carolina*, 325 U. S. 226. This is true even though the Florida and Nevada courts appear to characterize the jurisdictional prerequisites under their respective laws as domicile, *Wade* v. *Wade*, 93 Fla. 1004, 1007; *Laterner* v. *Laterner*, 51 Nev. 285; since we may be unwilling to apply as loose a test of "domicile," in determining whether extrastate enforcement is mandatory, as those States might properly choose to use in determining what divorces might be granted and effective within their own borders. Thus, at no point in the proceedings in Florida or Nevada in the instant cases was there an opportunity to litigate whether Mrs. Sherrer or Mr. Coe had acquired Florida or Nevada domicile, respectively, sufficient to entitle their divorces to extraterritorial recognition.

In considering whether the importance of the asserted uncertainties of marital status under existing law is sufficient to justify this result, it is important to think quantitatively, not dramatically. One would suppose that the diversity in the divorce laws of the forty-eight States, and the unwillingness of most of them to allow the few which make an industry out of granting divorce to impose their policies upon the others, undermines the structure of the family and renders insecure all marriages of previously divorced persons in the United States. The proportion of divorced people who have cause to worry is small indeed. Those who were divorced at home have no problem. Those whose desire to be rid of a spouse coincided with an unrelated shift of domicile will hardly be suspect where, as is usually true, the State to which they moved did not afford easy divorces or required a long residence period. Actually, there are but five States, Arkansas, Florida, Idaho, Nevada, and Wyoming, in which divorces may be easily obtained on less than one year's residence.[17] Indovina and Dalton, *Statutes of All States and Territories with Annotations on Marriage-Annulment-Divorce* (Santa Monica, 1945). These five States accounted for only 24,370 divorces in 1940, but 9% of the national total. Dept. of Commerce, *Statistical Abstract of the United States* (1946) p. 94. The number of divorces granted in Arkansas, Idaho, and Wyoming is small enough to indicate the normal incidence of divorce among their permanent population, with only few transients taking advantage of their divorce laws. Nevada and Florida thus attract virtually all the non-resident divorce business. Yet, between them, only 16,375 divorces were granted in 1940, 6% of the total. *Ibid.*

[17] North Carolina appears to be the only other State allowing divorce on less than a year's residence, but it does not allow divorce for many of the usual causes. The *Williams* cases attest that its laws are not lax.

Some of these people were undoubtedly permanently settled in those States, and have nothing to fear. Others may have moved to those States, intending to make their permanent homes there, and have since remained. They were amply protected by the Full Faith and Credit Clause even before today's decision. The only persons at all insecure are that small minority who temporarily left their home States for a State—one of the few—offering quick and easy divorce, obtained one, and departed. Is their security so important to the Nation that we must safeguard it even at the price of depriving the great majority of States which do not offer bargain-counter divorces of the right to determine the laws of domestic relations applicable to their citizens?

Even to a believer in the desirability of easier divorce—an issue that is not our concern—this decision should bring little solace. It offers a way out only to that small portion of those unhappily married who are sufficiently wealthy to be able to afford a trip to Nevada or Florida, and a six-week or three-month stay there.[18]

Of course, Massachusetts may not determine the question of domicile in disregard of what her sister States have found. A trial *de novo* of this issue would not satisfy the requirements which we laid down in the second *Williams* case, 325 U. S. at 236. Nor can Massachusetts make findings on this issue which preclude reexamination by this Court, nor may it, through prejudice in favor of its own policies, strain the facts to find continuance of the tie

[18] The easier it is made for those who through affluence are able to exercise disproportionately large influence on legislation, to obtain migratory divorces, the less likely it is that the divorce laws of their home States will be liberalized, insofar as that is deemed desirable, so as to affect all. See Groves, *Migratory Divorces*, 2 Law & Contemp. Prob. 293, 298. For comparable instances, in the past, of discrimination against the poor in the actual application of divorce laws, cf. Dickens, *Hard Times*, c. 11; Haskins, *Divorce*, 5 Encyc. Soc. Sci. 177, 179.

between the parties and itself. But the records in these cases do not justify the conclusion that Massachusetts has been remiss in its duty of respect. It is true that its courts did not employ a formal legal jargon and say that there was a presumption in favor of the findings of Florida or Nevada and that this presumption had been overcome by the evidence. But the Constitution demands compliance, not a form of words. To ascertain whether in fact there is a real basis for saying that Massachusetts did not accord proper recognition to Nevada's and Florida's findings, we must turn to the records and discover for ourselves just how much warrant there was for their findings of domicile.

The petitioner and respondent in *Sherrer* v. *Sherrer* were married in New Jersey in 1930, and moved to Monterey, Massachusetts, in 1932, where they lived together until 1944. They had two children. There was evidence that their relationship became less than harmonious towards the end of this period, that Mrs. Sherrer was troubled by a sinus infection and had been advised by a physician to go to Florida, and that she consulted a Massachusetts attorney about divorce before leaving. In March, 1944, she told Sherrer that she wished to take a trip to Florida for a month's rest and wanted to take the children along. She later testified that she had intended even then to go to Florida to stay, but had lied in order to obtain her husband's consent. His consent and the necessary funds were forthcoming. On April 3, 1944, Mrs. Sherrer and the children left for Florida, taking along a suitcase and a small bag, but leaving behind a trunk, some housedresses, and much of the children's clothing. They arrived the following day. She rented an apartment in St. Petersburg, which they occupied for about three weeks, then moved into a furnished cottage and later into another furnished cottage.

About a week after Mrs. Sherrer's departure, one Phelps, who had previously been at least an acquaintance of hers, knowing that she had gone to St. Petersburg, went there, met her soon after, and saw her frequently. On April 20, she wrote to her husband that she did not care to go back to him, and returned the money for train fare which he had sent. She sent her older daughter to school and took a job as a waitress. Phelps found employment in a lumber yard.

Florida law permits institution of proceedings for divorce after ninety days' bona fide residence in the State. On July 6, ninety-three days after her arrival in the State, Mrs. Sherrer consulted a Florida attorney, had the necessary papers drawn up, and filed a libel for divorce the same day. Sherrer, receiving notice by mail, retained Florida counsel, who entered a general appearance and filed an answer, which denied Mrs. Sherrer's allegations as to residence. The case was set for hearing on November 14. On November 9, Sherrer arrived on the scene. He and his wife entered into a stipulation, subject to the approval of the court, providing for custody of the children in him during the school year and in her during summer vacations. At the hearing, Sherrer's attorney was present, and Sherrer remained in a side room. The attorney did not cross-examine Mrs. Sherrer or offer evidence as to either jurisdiction or the merits, other than the stipulation regarding custody of the children. Sherrer was called into the courtroom and questioned as to his ability to look after the children during the school year. The hearing was closed, the decree being held up pending filing of a deposition by Mrs. Sherrer. On November 19, Sherrer returned to Massachusetts with the children. On November 29, the deposition was filed and the decree entered. On December 1, the petitioner married Phelps and the couple took up residence in the cottage which she and the children had previously occupied.

There they remained until early in February, 1945, when they returned to Massachusetts, staying for a few days at Westfield and then returning to Monterey. Phelps' father lived in Westfield, and Phelps testified that his father's critical illness occasioned their return. A few days later, Phelps was served with papers in a $15,000 alienation of affections action brought by Sherrer. He testified that the pendency of this action was the reason for his remaining in Massachusetts even after his father's health had become less critical. The trial was set many months ahead, but Phelps and the petitioner did not return to Florida. Rent on the Florida cottage for a month following their departure was paid, but this may have been required, as it was paid on a monthly basis. Some personal belongings were left behind there. Later, the landlord was informed that Phelps and the petitioner would not continue renting the cottage, and still later they asked that their belongings be sent to Monterey.

Sherrer had meanwhile moved out of the house which he and the petitioner had formerly lived in, which they owned together. Phelps and the petitioner moved in, and did not return to Florida. On June 28, 1945, a petition was filed by Sherrer in the Berkshire County Probate Court for a decree setting forth that his wife had deserted him and that he was living apart from her for justifiable cause. A statute provided that such a decree would empower a husband to convey realty free of dower rights. Mass. Gen. Laws c. 209, § 36 (1932). The Probate Court found that Mrs. Sherrer had not gone to Florida to make it her permanent home but with the intention of meeting Phelps, divorcing Sherrer, marrying Phelps, and returning to Massachusetts. These findings were upheld by the Supreme Judicial Court of the State.

The parties in *Coe* v. *Coe* were married in 1934 in New York City. Until 1939, they spent a large part of each year in travel, but had only one home, owned

by Coe, in Worcester, Massachusetts. Coe also owned other land, maintained bank accounts, paid taxes, registered his automobile, etc., all in Worcester.

Beginning in 1940, Coe also maintained an apartment in New York City, where much of his business was conducted. He usually lived there during the week, returning to Worcester on week ends. In New York City there also lived one Dawn Allen, his secretary and friend. His relations with Mrs. Coe deteriorated. It appears that during this period as well, his principal domicile was in Worcester. His own testimony as to where he intended to make his home at this time was contradictory. He kept bank accounts and most of his funds in New York and did jury duty there. He used his Worcester address in correspondence and when incorporating a personal corporation.[19] The trial judge found that his domicile remained in Worcester.

In January, 1942, Mrs. Coe filed a petition for separate support in the Worcester County Probate Court. Coe cross-petitioned for divorce. On March 25, Coe's petition was dismissed, and Mrs. Coe's granted; she was awarded $35 per week. She appealed, complaining of the amount. While the appeal was pending, Coe left Worcester for New York, and accompanied by Dawn Allen and her mother, left New York on May 31, for Reno, Nevada, arriving there on June 10. He lived at the Del Monte Ranch. He testified that he went there to relieve his asthma and because of Nevada's liberal tax laws. He also gave conflicting testimony as to whether he went there in order to get a divorce. On June 11, he consulted a lawyer for whom his Worcester attorney had prepared a divorce memorandum. He opened a bank account and rented a safe deposit box, registered

[19] For purposes of State taxation, he might well have been regarded as domiciled in either State. *Cf. Worcester County Trust Co.* v. *Riley*, 302 U. S. 292; *Texas* v. *Florida*, 306 U. S. 398.

his automobile and took out a driver's license, all in Nevada. He did not sever his other ties with New York or Massachusetts.

Nevada law permits institution of proceedings for divorce after six weeks' residence. Forty-seven days after his arrival in the State, Coe filed a complaint for divorce, alleging six weeks' bona fide residence. Notice was mailed to Mrs. Coe, who followed to Reno, engaged an attorney, and demurred to the complaint. Subsequently, however, she and Coe entered into a written agreement, providing for a lump sum payment to Mrs. Coe of $7,500, and $35 per week. On September 19, she filed an answer in which she admitted Coe's residence as alleged in his complaint, and a cross-complaint. On the same day, a divorce was granted to Mrs. Coe, and the court adopted the agreement. Also on the same day, Coe married Dawn Allen. Two days later they left Reno, returned to New York, where Coe gave up his apartment, and returned to Worcester on October 1, residing at a house owned by him there.

On February 25, 1943, the Supreme Judicial Court of Massachusetts affirmed the separate maintenance decree of the Worcester County Probate Court. Coe made no payments to the respondent under either that decree or that of the Nevada court, other than the $7,500 lump sum. On May 22, 1943, respondent filed a petition in the Probate Court to have him cited for contempt. Coe petitioned to have the decree revoked because of the supervening Nevada divorce decree.

While this was pending, Coe and Dawn spent a part of the summer of 1943 at the Del Monte Ranch, near Reno, to confer with Coe's Nevada divorce lawyer and to negotiate for the purchase of the Ranch. Apparently, the purchase was not made. With the exception of this period, he and Dawn have resided at Worcester continuously since their marriage. Coe kept his bank accounts

and post office box there, and paid his poll tax and other local taxes. In February, 1944, he purchased a more expensive house, into which they moved. In various formal papers, he noted Worcester as his residence.

On October 21, 1943, the Probate Court, on the basis of the Nevada divorce, revoked its separate maintenance decree. The respondent's proffer of evidence to show lack of jurisdiction in the Nevada court was rejected. This ruling was reversed by the Supreme Judicial Court, which sent the case back to allow evidence contradicting the Nevada finding of domicile. On remand, such evidence was taken, the gist of which has been summarized. The Probate Court found that the parties had been domiciled in Massachusetts throughout, and that Coe's trip to Nevada was made in order to obtain a divorce and not to change his domicile. These findings were upheld by the Supreme Judicial Court.

Conceding that matters of credibility were for the triers of fact, the evidence appears to me to have been ample to justify the findings that were made, even giving every weight to the contrary Nevada and Florida determinations and treating the burden on the party contradicting those determinations as most heavy. Judges, as well as jurors, naturally enough may differ as to the meaning of testimony and the weight to be given evidence. I would not deem it profitable to dissent on such an issue touching the unique circumstances of a particular case. My disagreement with the decision of the Court is not as to the weight of the evidence, but concerns what I take to be its holding; that the opportunity of the parties to litigate the question of jurisdiction in Nevada and Florida foreclosed Massachusetts from raising the question later. If the Court had merely held that the evidence was not sufficient to justify Massachusetts' findings, contrary to what was recited in the decrees of Nevada and Florida, or, as an added assurance that obligations of recognition be

honored, had required of the Massachusetts court explicit avowal of the presumption in favor of the Florida and Nevada decrees, I should have remained silent. But the crux of today's decision is that regardless of how overwhelming the evidence may have been that the asserted domicile in the State offering bargain-counter divorces was a sham, the home State of the parties is not permitted to question the matter if the form of a controversy has been gone through. To such a proposition I cannot assent. Decisions of this Court that have not stood the test of time have been due not to want of foresight by the prescient Framers of the Constitution, but to misconceptions regarding its requirements. I cannot bring myself to believe that the Full Faith and Credit Clause gave to the few States which offer bargain-counter divorces constitutional power to control the social policy governing domestic relations of the many States which do not.